BRIEF

OF

Estes & Jackson

UPON MOTION TO DISMISS THE WRIT OF ERROR

IN

Supreme Court of the United States

No. ~~326~~ 105.

THOMAS MURDOCK, et al

vs.

The Mayor and Aldermen of the City of Memphis, et al,

In Error to the Supreme Court of the State of Tennessee.

MEMPHIS.

H. Wade & Co., Printers and Stationers, 297 Main Street.

1873.

THOMAS MURDOCK, et al

VS.

The Mayor and Aldermen of Memphis. et al

IN THE

Supreme Court of the United States

No. 326.

Motion of the Defendants in Error to Dismiss the Writ of Error for Want of Jurisdiction.

STATEMENT OF CASE.

The ancestors of the plaintiff in error, were the proprietors of the 5000-acre tract of land upon which the city of Memphis is situated. On day of July, 1844, these proprietors as parties of the first part, the Mayor and Aldermen of the town of Memphis, as the party of the second part, together with parties of the third and fourth parts, executed "*the deed of compromise*" for the considerations and purposes set forth therein. See Exhibit C to the bill Record p. 9 &c. The object of this deed, was to provide "a location for the Naval depot, lately established by the United States at said town." After the establishment of the Navy Yard upon the land designated in the deed, and the expenditure of almost one million of dollars thereupon by the Government, the whole property was ceded to the city of Memphis by Congress under the act of August 5th, 1854.

This act is found upon p. p. 116 and 212 of the Record, and is as follows:

SEC. 111. "And be it further enacted, that all grounds "and appurtenances thereto belonging, known as the "Memphis Navy Yard, in Shelby county, Tennessee, be "and the same is hereby ceded to the Mayor and Alder-"men, of the city of Memphis, *for the use and benefit of* "*said city, etc.*"

After the act of cession, the city took possession of the property and held it under that claim of title until

November 22d, 1866, when the bill in this cause was filed *in the Chancery Court at Memphis*, to recover the same.

That Court dismissed the bill by its decree entered in the spring of 1868, (Record p. 208) from which decree the complainants appealed to the Supreme Court of Tennessee, and by that Court the decree of the Chancellor was affirmed on 7th of January, 1870. Record p. 209. This writ of error is prosecuted to reverse the last mentioned decree.

The substance of the plantiffs claim to the property is, that by "the compromise deed" it was devoted to the special purpose of a Navy Yard, and that when that purpose was defeated and the Navy Yard finally abandoned by the cession of the property to the city, the title to the property reverted to the grantors in the deed, and that the city holds the title in trust for them.

See the statement of the bill on page 5 of Record.

It will be observed that after the Supreme Court of Tennessee had entered its decree affirming the decree of the Chancellor, and after a rehearing had been refused by that Court, the following minute was entered of record:

"The decree heretofore rendered in this cause is so "modified by inserting the following recital: The Court "is of the opinion and does declare that the act of Con- "gress appoved August 5th, 1854, cedes the property in "controversy in this cause to the Mayor and Aldermen "of the city of Memphis, for the city only, and not in "trust for the complainants, and that the complainants "took no benefit under said act."

Record p. p. 209 and 210.

Upon this minute and occasional references, in the pleadings, to the act of Congress, the plaintiffs in error claim, that in this cause was drawn in question, the validity or construction of an act of Congress within the meaning of 25th Section of the Judiciary Act, or that "a right, title, etc." claimed under an act of Congress was involved, and the decision was against that right, etc. within the meaning of the act of February 5th, 1867.

14 Stat. at large 386.

Upon this theory then, the plantiffs in error maintain the jurisdiction of this Court and prosecute their writ of error; and upon a denial, that *in reality* the construction or validity of the act of Congress was drawn in question, and that any "right, title, etc.," claimed under the act of Congress was involved in this suit, this motion to dismiss the writ of error is predicated.

The motion assumes that the "title or right" set up by the plantiffs in error, "*arises out of the contracts and transactions of the parties*" and not out of the validity or construction of the act of Congress nor *under* that act in any shape; and that therefore, the jurisdiction cannot be sustained.

BRIEF.

The tests of Jurisdiction, under 25 Sec. of the Judiciary Act, are collated and stated by Nelson, J., in delivering the opinion of this Court in the case of Williams vs. Oliver, 12 How. 124, in substance as follows: "A question must not only exist on the Record "*actually, or by necessary intendment*, as mentioned in "that section, etc., but the decision *must be controlling* "in the deposition of the case, or the judgment of the "State Court would not have been what it is if there had "not been a misconstruction of some act of Congress or "a decision against the validity of the right, title, "privilege or exemption set up under it; or it must ap- "pear from the facts stated by just and necessary intend- "ment that the question was made, and that the Court "below must, in order to have arrived at the judgment "pronounced by it have come to the very decision of "that question as indispensable to that judgment, etc. A certificate of the Court that the validity or construction, etc., of an Act, etc., was drawn in question, will not give the jurisdiction unless the Record shows that this was so, in fact.

Railroad Co. vs. Rock, 4 Wall. 177.

Lawton vs. Walker, 14 How. 149.

Mills vs. Brown, 16 Pet. 525.

Therefore, if the minute of the Supreme Court of Tennessee, above quoted, can be considered a certificate of that Court, that the validity or construction of the act of Congress was drawn in question, etc., within the meaning of the statutes;—yet, the Court must look to the record—the pleadings, evidence, decree, etc—to determine whether, *in fact*, any such question was involved.

The pleadings, it is submitted, clearly show that the case was put upon grounds entirely distinct from any claim under this act of Congress.

We quote from the bill on page 5 of the Record.

"Complainants charge that by this failure of the "United States to appropriate the said premises to the "purposes intended, and by the final abandonment of "any intention on the part of the United States ever to "do so, the said property comes within the operation of "that clause of the said deed of compromise which "provides for the same being vested in Seth Wheatley "as Trustee for distribution amongst the parties entitled; "or in the event such is not the effect in strict law, that, "the property having been conveyed to the city for a "purpose which has failed, the same is held by the city "upon a trust resulting to the parties by whom the con-

"veyance was made, *and the cession of the United States* "to the city, cannot affect the rights of complainants as "against the said city of Memphis, etc."

Here we have "*the title, right, privileye, etc.*, set up by complainants based entirely upon principles of Common Law and Equity arising out of "the compromise deed," and the transactions of the parties, and so far from the claim of a "right or title" *under* the act of Congress, the claim is made *in dispite* of the act of Congress.

The same theory, *in substance, but in a different dress*, is presented in the petition for the writ of Error.

Record p. p. 211 and 212.

The evidence in the cause *includes* the act of Congress, but in it there is nothing which will warrant a claim of a right or title by the complainants under the same. And it is submitted that a careful and critical examination of the record will develope no such claim of "right, title, etc., except so far as the minute or recital by the Supreme Court of Tennessee, above quoted, constitutes a certificate by that Court to that effect. The act of Congress is entirely free from doubt or ambiguity. No question could possibly be made about the validity or construction of that act, and there is not a pretense that any "right or title" is conferred upon the complainants by its terms; for the property is distinctly ceded to the city "*for its use and benefit.*" It is perfectly manifest that the statement from the bill above quoted, is the real claim of the complainants, and that they assert that their right or title "arises out of the contract and transactions" of the parties, "*notwithstanding* the act of Congress, and that the act *did not affect* that right or title."

The only "right or title" set up under the act of Congress was on behalf of *the city*, and the decision was *in favor* of that right.

The claim of the plantiffs in error is, either that by the breach of the condition *subsequent* in "the compromise deed," the property reverted to the grantors *by the terms of the deed and by law*; or that by virture of the conditions of the deed and the transactions of the parties, a trust results to the grantors, and *under the doctrines of Equitable Jurisprudence*, the city having acquired the legal title *by whatever means*, holds the same in trust for them. This is apparent throughout the record, and no "right or title" is, or can be claimed under the act of Congress,

The following is an apt illustration to show the fallacy of the argument that in this case "a right or title" is claimed under the act of Congress: A hands $1,000 to B and employs him as his agent to enter public lands, which are open to entry under the Acts of Congress; B in violation of his duty to his principal, enters the land *in his own name* and procures a patent or grant to him-

self. In a Court of Equity B would be held as a Trustee, and the land would be decreed to A upon well established principles of equitable doctrine. But his right or title would not arise under the Acts of Congress, nor would the case involve the construction of such Acts. On the contrary, the relation existing between the parties, the advancement by A of his money and the investment of that money in the land, would create the trust, and out of these circumstances and transaction would arise A's right or title. In such a case, would it be insisted that this Court had jurisdiction within the meaning of 25th Section of the Judiciary Act or of the Act of 1867? After the Supreme Court of a State had decided adversely to A's right or title, could the jurisdiction of this Court be be sustained upon an application of the tests of jurisdiction stated in the Williams vs. Oliver? (Supra) Would this Court say that "this judgment of the State "Court would not have been what it is, if there had not "been a misconstruction of the Acts of Congress?" Surely not.

Without revewing all of the decisions of this Honorable Court, upon the question of jurisdiction under these Acts, we select a few only which seem applicable to the case at bar, and which we submit as conclusive of the question.

Matthews vs. Zane, et. al. 7 Wheat 164, was a contest for title under different entries of the public lands. Marshall. C. J. says in delivering the opinion of the Court: "The plantiff has stated several equitable cir- "cumstances *in aid* of the title given by his entry; but "unless his entry be in itself valid, there could have "been no misconstruction of any Acts of Congress in "dismissing the bill, and this Court can not take into "consideration *any distinct equity arising out of the con- "tract and transactions of the parties*, and creating a "new and independent title."

Applying this principle to the present case, we ask, how is it possible for the plantiffs in error to sustain any right or title under the act of Congress; unless this Court "takes into consideration, a distinct equity arising out of the contract and transactions of the parties?" Their whole case depends *upon distinct equities* arising out of the contract and transactions of the parties. And these cannot be used in *aid* of the act of Congress, because, as already shown, that Act does not profess and cannot be construed to give them "any right or title" whatever. In the language of the bill, this act of Congress "*can not affect* the rights of complaniants, etc." [if any such rights exist] under "the contract and transactions of the parties" *and not under said Act.*

In the case of Carpenter vs. Williams, 9 Wall 785, the writ of error was dismissed, upon the ground that "in the case before us, the rules which must determine the question at issue *are common law rules*, and the result

can not be varied by the application of any principle of Federal law or Federal authority."

In People vs. Central Railroad, 12 Wall 455, the writ of error was dismissed, upon the ground that "the question arose under *the agreement* and not under any act of Congress."

It is confidently submitted that this writ of error should be dismissed.

ESTES & JACKSON,
Solicitors for Def'ts in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1872.

MURDOCK *et al.*
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF MEMPHIS *et al.*, } No. 106.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

The Legislature of Tennessee having presented a memmorial to Congress, in relation to the expediency of establishing a navy-yard at Memphis, in that State, a bill was reported by the Committee on Naval Affairs of the House of Representatives, authorizing the Secretary of the Navy to cause to be made the requisite examination and survey of the harbor of that city. It passed the House, but failed to become a law. (Record, p. 155). A commission consisting of officers, was, however, organized for that purpose by the Secretary of the Navy. They submitted their reports, May 14, and October 20, 1843. (Do., pp. 145, 164). Congress, by the act of June 15, 1844,

authorized the President to select and purchase a site for a navy-yard at Memphis, and to erect buildings, &c., and appropriated $100,000 for the purpose. (U. S. Stat., vol. 5, p. 604). The same officers, accompanied by the Engineer of the Bureau of Yards and Docks, were appointed to select a site. They did so, and reported September 16, 1844, the results of their examination, and transmitted a copy of the deed for the selected site, accompanied by an abstract of title. (Record, pp. 123-125.) Their action was approved by the Navy Department. The deed bears date the 14th of that month, and is executed by the Mayor and Aldermen of the town of Memphis. In consideration of the sum of $20,000 it conveys, with the usual covenants of warranty, the property therein named to the United States, (Do., p. 210,) who took possession thereof, appropriated and used the same as a navy-yard, and expended a million of dollars in erecting buildings and making other improvements. (Report of the Senate Committee on Naval Affairs and Report of the Bureau of Yards and Docks. (Do., pp. 133-142.) Congress, however, deemed it impolitic to continue such an establishment at that point, and by the act of August 5, 1854, ceded the Memphis navy-yard to the city. On the 20th of October, pursuant to the provisions of that act, and to the order of the Department, the commandant (Do., p. 120) unconditionally surrendered the property to the municipal authorities, who have since been in the continuous and exclusive possession thereof under claim of title, except for a brief period during the rebellion, when the United States forces occupied a portion of it for military uses.

On the 10th day of May, 1857, the city mortgaged the tract known as "the navy-yard property," containing seventy-five acres, more or less, to Samuel Tate and James

Elder, trustees, to secure the payment of certain bonds of the Memphis and Little Rock Railroad Company, amounting to $300,000. The instrument was duly recorded on the 30th of the following month. The Supreme Court of Tennessee has held that the mortgage was executed by the city in the due exercise of its corporate powers, and is a binding and valid obligation.—(2 Coldwell, 646.)

A greater part of the navy-yard property was purchased by the city. The remainder, which is involved in this suit, consists of certain alluvial land. It is situated on the western boundary of a tract of 5,000 acres, granted April 28, 1786, by the State of North Carolina, to John Rice, upon which the town of Memphis was laid out. A controversy had arisen, touching the ownership of this alluvial formation or batture in the Mississippi river, between the proprietors of the grant, the town of Memphis, and certain persons who, as holders of warrants, had assumed to enter it as vacant and unappropriated property.

The report of the officers who selected the navy-yard site sets forth that unexpected difficulties had occurred in procuring a title. It became necessary therefore to reconcile conflicting claims. This was accomplished. The parties claiming under the Rice grant, of the first part; the Mayor and Aldermen of the town of Memphis, of the second part; the warrant locators, of the third part; and Seth Wheatley, as trustee, of the fourth part, made and entered into an indenture on the—day of July, 1844.—(Record, p. 9.)

The premises recite that a controversy had arisen, touching "the ownership of the alluvial land," and that "*the location of the naval depot lately established* by the United States at said town, and the general interests of the citizens and property-holders thereof, require that the

title to that part of the said alluvial land which lies west of the public promenade and public buildings, as dedicated on the bluff of Memphis by the original proprietors, shall be withdrawn from litigation, so that no obstacle shall stand in the way of the commencement of the public works aforesaid, and that the threatened decline and removal of the town may be prevented by affording an opportunity of doing business at or near the water's edge." In consideration of the premises, the parties of the first and third parts convey in fee to the town of Memphis, the party of the second part, "*for the location of the naval depot aforesaid*, all that portion of the said alluvial land within the limits of the town of Memphis which lies north of Market street extended, and westwardly of the Mississippi river." The parties of the first, second, and third parts convey to Seth Wheatley, the party of the fourth part, and his heirs, the residue of the alluvial land south of Wolf river, and also that part of it mentioned and designated for the naval depot, in case the same shall not be appropriated by the United States for that purpose. The remainder of the indenture has no bearing upon any question arising in the record.

The original complainants filed their bill in the Chancery Court of Memphis, November 23, 1865. The foregoing indenture was made an exhibit. Other complainants were added September 30, 1867, (Do., p. 28,) under an agreement that the answers on file should apply to them as fully as if they had been named in the original pleading. (Do., pp. 26, 28.) They claim, as the real representatives of a portion of the owners of the John Rice grant. The Mayor and Aldermen of the city of Memphis, Tate, Elder, and the heirs of said Seth Wheatley are made defendants. The bill charges that by failure of the United States to appropriate the property in controversy, for the purpose intended,

and by their final abandonment of any intention to do so, the "property comes within that clause of the indenture which provides for the same being vested in Seth Wheatley, and that if such is not the effect, the same is held by the city upon a trust resulting to the parties by whom the conveyance was made, and that the cession of the United States to the city cannot effect the rights of the complainants as against the city of Memphis."—(Do., p. 3.)

They pray that the city of Memphis be declared a tenant in common of the property with them, for an account of rents and profits, and such further relief as the nature of the case requires.

Tate and Elder answer, setting up the mortgage.—(Do., p. 32.)

The Mayor and Aldermen file a seperate answer.—(Do., pp. 18, 21.)

They admit the execution of the indenture, and allege that the United States appropriated the property for the purpose therein mentioned, made costly and extensive improvements thereon; that the same was notoriously in the possession and under the control of the Navy Department, and the jurisdiction of the State excluded therefrom until a short time after it was ceded to the city by the act of August 3, 1854, since when it has been in the possession of the city, except during a short period, when the United States, by superior force, took possession of a part of the same, and appropriated the rents of other portions without questioning or denying the right and title of the city to the property. The execution of the mortgage to Tate and Elder is admitted, and the city, denying the construction put by the complainants upon the indenture of 1844, demurs to the complainants' bill, so far as it seeks relief upon the ground either of a breach of a condition subsequent, or of a re-

sulting trust, and prays that it may have the benefit of a demurrer, as if the same had been formally filed.

The city sets up the open continuous and adverse possession of the property by herself and the United States for more than twenty years, and pleads and sets up the statutes and laws of prescription and limitation, and especially sections 2,763, 2,764, and 2,765 of the Code of Tennessee, and claims that, by virtue of such possession, her title is absolute and indefeasible.—(Do., pp. 18-21.)

No replication is required by the practice of the chancery courts of Tennessee to complete the issue. Some depositions were taken to establish the heirship of complainants, and others, to prove that a navy-yard, such as was contemplated by Congress, was not founded at the city of Memphis.

The cause coming on to be heard upon the pleadings, agreement records, and evidence on file, the court sustained the demurrer of the Mayor and Aldermen of the city of Memphis, first, by them pleaded in their answer, and was of opinion that the title of the Mayor and Aldermen of the city of Memphis, to the property in controversy, as against the complainants, is perfect, both under the act of session of the Congress of the United States, and by the statutes of limitations, and that the complainants are entitled to no relief in the premises, and that their bill and amended bill ought to be dismissed.

The court thereupon dismissed "the original and amended bills."—(Do., 208-209.)

On appeal, the Supreme Court of the State of Tennessee, being of opinion that in the decree of the chancellor there is no error, and that the same ought to be affirmed, rendered on the 7th of June, 1870, a decree of affirmance.

On the 30th of June a petition for a rehearing was filed, which, on the 3d of July, was refused. On the

following day the decree was modified by inserting in it the following writtal:

"This court is of opinion, and does declare, that the act of Congress, approved August 5th, 1854, cedes the property in controversy in this cause to the Mayor and Aldermen of the city of Memphis, for the use of the city only, and not in trust for the complainants, and that the complainants take no benefit under said acts."—(Do., p. 210.)

It is very obvious that the record presents no federal question, and that this court has no jurisdiction under the act of '89 or '67.

The complainants put their case upon a breach of condition, and, if that is not a valid ground, upon a trust. They rely, however, wholly upon the provisions of the indenture and upon the imputed failure of the United States to appropriate the premises to the intended purpose. It may be gravely doubted whether these provisions constitute a condition. They contain none of the apt and technical words by which an express condition is created; but conceding that there was a condition annexed to the grant, it was followed by a limitation over to Seth Wheatley. The entire fee, in this view of the case, passed out of the grantors and vested in the city, subject to be determined on the breach or non-fulfilment of the condition, and then vesting in Wheatley, without entry or claim on his part. The condition was, however, fully performed when the United States established the navy-yard upon the land in question. In Meade *vs.* Ballard, (6 Wallace, 290,) a grant was made "upon the express understanding and condition" that an institution should be permanently located upon the granted premises, and that on failure of such location within a year from the date of the deed, and on repayment of the purchase money

without interest, the premises should revert to, and become the property of, the owners. The building was erected within the time named. It was afterwards burned, and the trustees then erected other buildings upon some contiguous property. This court held that the condition was performed when the trustees passed a resolution locating the building on the premises, with the intent that they should be the permanent place of business of the corporation. The institution was then permanently located within the meaning of the contract. The condition did not operate as a covenant to build and rebuild or keep the building on the land for an indefinite time. This is a decisive authority for the position which I have assumed. If however, it be contended that, by the terms of the indenture, the United States were not only to "appropriate" the premises "for the location of the naval depot," but to keep up such depot permanently, and in all coming time, and, on their failure to do so, at any moment, however remote, the fee of the premises was then to vest in Wheatley, it is evident that such a conditional limitation can not be enforced. A fee could not be limited upon a fee by a conveyance at common law. In a conveyance to uses when the entire fee passes out of the grantor, all limitations which vest an estate in a third person, upon the breach of a condition, or upon a future contingency, which defeats a prior estate in fee, *must* necessarily take effect, if at all, within a life or lives in being, and within twenty-one years thereafter. If the limitation *may*, by possibility, not take affect at or before the expiration of that time, it is void. The same rule applies to a shifting use as to an executory devise. In either case, if the event or contingency, upon which the gift ever is to take effect, *may* arise after the time permitted by law, the limitation is without force or efficacy, and the first taker has an unconditional estate.

A citation of authorities in support of this elementary doctrine would be superfluous. I may, however, be permitted to remark that the English cases are collected and and the doctrine well illustrated and applied in The Proprietors, &c., *vs.* Grant, 3 Gray, 142.

In the present cases the limitation over, as construed by the complainants, *might* take effect at a distant period, entirely uncertain and indeterminate, depending upon the opinion of Congress, in regard to the necessities of the naval service and to the expediency of maintaining the yard at Memphis. The city, therefore, took an absolute fee.

If, however, the limitation over took effect and vested the estate in Wheatley, the remedy of his heirs to recover the prossession of the property, if it be wrongfully withheld, is at law. This is a fatal objection to the bill.

The bill alledges that the property is held by the city upon a trust resulting to the complainants. The act of Congress is only cited, however, as matter of history, furnishing conclusive proof that the United States had abandoned all intention of keeping up the navy-yard. The complainants instead of setting up or claiming under it, "any title, right, privilege or immunity," insist that the cession of the property thereby made to the city cannot affect their rights. They in effect charge not that a trust was declared by the act, but that a trust exists independently of the act and cannot be impaired by it.

The only trust created, or which could by any species of implication arise, was to convey the property "for the location of the naval depot." If it was required for that purpose, and the city then failed to transfer it to the United States, she might have been thereto compelled. The recitals in the indenture leave no doubt as to the intent and purpose of the parties and admit of but one construction.

The early location of the contemplated improvement, for which Congress had provided in the preceding month, and the general interests of the city alike required an immediate adjustment of the conflicting claims to the alluvial deposit between the bluff, on which Memphis is situate, and the bed of the river. A portion of it had been marked as a site for a naval depot by the officers who surveyed the harbor in 1843, and they, with another officer detailed by the department, were, during the summer of 1844, engaged in making examinations with a view of reporting a site for the sanction of the President. A good title to the ground was indispensable, as it must be passed upon before a deed could be accepted or the purchase money paid. (U. S. Stat., vol. 5, p. 604.) Two of the parties adversely claiming conveyed to the third the land in question for a depot. Should it not be so appropriated, all the parties united in conveying it and the remainder of the batture to Seth Wheatley, subject to certain trusts. The same objects might have been as well attained by vesting Wheatley, in the first instance, with the title to the whole property in trust to convey to the United States a specific portion of it for a depot, and if it was not required for that purpose, then to hold it all for the trusts to which the remainder was limited by the indenture of July, 1844. If Wheatley had conveyed to the United States, by a good and sufficient deed, free from all conditions, the land in question, without specifying any use or purpose to which it was to be applied—and the United States would have refused to accept any other assurance of title—he would have fully executed the trust according to the terms of the indenture, and the rights of the parties to the land conveyed would have been thereby concluded. If the United States, after ten years of experience, had deemed it impolitic to continue the

navy-yard, and had conveyed the property to the city, can it be seriously urged that she held any part of it in trust for the other parties to the indenture? If not, how can such a result be claimed, because the city was clothed with the title which she passed to the Government, in accordance with the contract?

Should it be claimed that by discontinuing the navy-yard a trust would result to the complainants, I answer this is a question, growing out of the deeds and transactions of the parties, to be settled by the local law, and does not arise under the act of Congress. It is independent of it. If proceedings against the United States were authorized, for the purpose of trying the title, the question would equally apply had they retained the property and applied it to other public uses. The decisions of the courts of Tennessee upon it present nothing for revision here. I may remark in passing that they conform to the opinion of this court in the analogous case of Van Ness *vs.* the Corporation, &c., 4 Peters, 232.

If, therefore, the indenture created a trust, it was executed; if it annexed a condition to the estate, it was performed. If a trust resulted on the refusal of Congress to keep up the yard, that, with the other questions arising out of the contract, was presented by the pleadings. The determination of them upon demurrer disposed of the whole matter in controversy.

The city set up, in bar to the complainants' right to recover, three sections of the code, which constitute the statute of limitations. Seven years adverse possession of land by a party, or those through whom he claims, under any assurance of title purporting to convey an estate in fee, without any claim by action commenced and prosecuted effectually against such party, vests in him an absolute and indefeasible title under that statute in Tennes-

see. The person, or those claiming under him, who neglect to avail themselves of the benefit of this title, by action prosecuted within seven years shall be forever barred. The statute not only protects the possession by witholding a remedy, but confers a good and indefeasible title.

This defense was a good and valid one, sufficient to sustain the judgment below.

The chancery court held that the title of the city to the property in controversy was perfect under the statute of limitations, and also under the act of Congress. No question touching the construction of the act was raised, and its terms are too plain to admit of a doubt. The complainants alleged it as a part of the history of the city's title, and protested that the cession of the property thereby made did not interfere with their pre-existing rights under the contract. The decision, instead of being against the title under the act of Congress, was in favor of it.

The Supreme Court, in its judgment of affirmance, held that the demurrer was well taken, and that the statute of limitations was a bar to the proceedings. Neither of these rulings presented a federal question, and each of them was a final and conclusive determination of the matters involved.

The recital, in the opinion of the Supreme Court of Tennessee, after they had affirmed in all things the decree of the chancery court and refused a rehearing, can have no material bearing upon the question of jurisdiction. In Landor *et al. vs.* Walker *et al.*, 14 Howard, 152, this court, following a settled rule of decision, declared that "the 25th section of the judiciary act required something more definite than the certificate of the Supreme Court to give this court jurisdiction." In Railroad Company

vs. Rock, 4 Wallace, 177, the learned judge, in giving the opinion of the court remarks: "It is probable that counsel, in the argument of the case, insisted that these matters were involved, and that the chief justice felt bound to certify, when requested, that they were drawn in question. But, if the record does not show that they were necessarily drawn in question, this court can not take jurisdiction to revoke the decision of the highest court of a State, upon the ground that they were drawn in question in argument." And in Parmelye *vs.* Lawrence, 11 Wallace, 36, Mr. Justice Nelson observes, after quoting with approbation, the foregoing remarks: "If this court should entertain jurisdiction upon a certificate alone, in the absence of any evidence of the question in the record, then the Supreme Court of the State can give the jurisdiction in every case where the question is made by counsel in the argument. The office of the certificate is to make more certain and specific what is too general and indefinite in the record, but it is incompetent to originate the question within the true construction of the 25th section.

These authorities are explicit and decisive. They might be multiplied to an almost indefinite extent, for the question is presented at nearly every term of this court; but nothing can be found in conflict with them.

The act of Congress will be found in the record, (Record, p. 212.) It cedes the navy yard property "to the Mayor and Aldermen of the city of Memphis, *for the use and benefit of said city.*" The last eight words are surplusage and add nothing to the effect of it. The city would have been invested with both the legal title to, and the beneficial interest in, the ceded property, quite as effectually without, as with them. The Supreme Court is of opinion that the act cedes the property, "*for the use of the city only,*

and not in trust for the complainants." This diffuse expression only makes the pleonasm more redundant, for property transferred to a party *for his use*, negatives the idea that a trust is thereby created for a third party. The judgment merely recites the act with a superfluous addition.

The conclusion of the certificate is "that the complainants take no benefit under said act." The pleadings so far from claiming any, allege, as before remarked, that the act "cannot effect" their rights, and the decision was based upon distinct and independent grounds, each of which is sufficient to sustain it. This court, therefore, will not assume jurisdiction. (Klinger *vs.* State of Missouri, 13 Wallace, 257.)

The record sets out the petition of the complainants for a writ of error. (Do., p. 212). Such a petition was unnecessary, and does not legitimately belong to the record. If it did for any purpose, it would not aid the complainants, as it merely shows that even the ground they assumed in argument before the Supreme Court does not present a Federal question. They say:

"Your petitioners claimed that, under the true and proper construction of this act, the United States withdrew from the property and surrendered it, or gave it back to the city of Memphis, from whom it had originally been received by the United States as a donation for the erection thereon of a navy-yard; and, it appearing that in so donating, it the city of Memphis acted as a trustee for your petitioners, being a tenant in common with them in said property, and expressly receiving it in trust to make said donation, your petitioners insisted that the city of Memphis, by virtue of said act, held it in trust for complainants, and that herein was a right and benefit which complainants possessed under said act."

The city, by her conveyance, discharged the only trust created by the indenture of 1844. No question is made by the complainants as to the intent and meaning of the act of Congress. It transferred the premises absolutely and unconditionally to the city, and she thereby acquired all the title of the United States. Whether a trust had previously attached to that title, or whether, by reason of the former relations of the parties, it would thereafter arise—a result which it is difficult to perceive—depends upon the laws of Tennessee, but presents no matter of which this court can take cognizance.

We submit that this court has no jurisdiction, and if it had, the judgment should be affirmed.

W. T. OTTO,
Attorney for Defendants in Error.

Story 21-591

SOME OBSERVATIONS

CONCERNING THE

REPEAL OF THE 25TH SECTION OF THE JUDICIARY ACT OF 1789, BY THE 2D SECTION OF THE ACT OF FEBRUARY 5TH, 1867, (14 STS., 385.)

BY MR. B. R. CURTIS, as *Amicus Curiæ*.

Three questions may be considered:

1st. Does the later statute repeal the earlier?

2d. If so, what changes in the previously existing law have been made by such repeal?

3d. Had Congress power to make those changes?

AS TO THE FIRST QUESTION.

The general subject of each law is the same. Each confers appellate jurisdiction on the Supreme Court of the United States, over judgments of State courts, which, *by reason of their subject-matter*, are within the judicial power of the United States, under the 1st clause of the 2d section of the 3d article of the constitution; and each defines the cases in which that appellate power may be exercised, and regulates the mode of exercising that appellate power under the 2d clause of the same section.

The two laws differ in the following particulars: —

First. In defining the cases over which this appellate power shall extend.

In the earlier law one class of cases was described as follows: "Or where is drawn in question *the construction* of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States."

In the later law there is substituted the following description: "Or where any title, right, privilege, or immunity is claimed under the constitution, or any treaty, or statute of, or commission held, or authority exercised under the United States," etc.

The earlier law describes and includes only cases where *some question of construction* is drawn in question. The later law applies to and includes all cases where a *title*, etc. was claimed under the constitution, etc., and the decision was against the validity of *that title*, whether that decision rested upon some question of *construction* of the constitution, or some law or treaty of the United States, or upon any other question entering into the decision of the State Court on the title capable of being assigned as erroneously made in contravention of law.

This later description may include cases other than those embraced in the earlier law. The State court may have decided against the *title*, etc., without misconstruing the constitution or any act of Congress, and yet have made a decision erroneous in point of law in the judgment of the appellate tribunal.

It seems to have been intended to place titles, rights, privileges or immunities claimed under the constitution, laws or treaties of the United States under the final guardianship of this court on whatever questions of law the same might depend.

Suppose the State court ruled erroneously in admitting or rejecting evidence, or any other question of local law, and the decision was against the right or title, not by reason of any misconstruction of the constitution, but by reason of such errone-

ous ruling. It seems to have been the intention of congress to enable this court to protect the right, etc., claimed under the United States from the effect of such errors.

Second. The laws differ in the regulations each prescribes for the regulation of the exercise of this appellate power.

The former law restricts the assignment of errors to those appearing *on the face of the record*, and it had been construed strictly to refer to the technical record.

The later law omits this provision.

The former law further restricts the appellate power of this court to errors "which immediately respect the before mentioned questions of construction," etc.

The later law contains no such restriction, and any error in law made duly apparent to the court of errors is left assignable.

The action of the appellate court on reversal is not required by each law to be the same. The earlier law confers discretion to proceed to a final judgment and award execution — "*if the cause shall have been once remanded before.*" The later law confers this discretion without qualification.

This is a case where the later statute was manifestly intended to cover and provide for the subject-matter of the earlier law and to qualify the provisions of the earlier law not only by omission, but by addition and alteration; and all authorities, I believe, agree that in such a case the later repeals the earlier act by necessary implication.

Stewart *v.* Kahn, 11 Wal. 502.
United States *v.* Tyrren, 11 Wal. 92.
Ellis *v.* Page, 1 Pick. 45.
Nichols *v.* Squire, 5 Pick. 168.

II. The changes made by this repeal have already been pointed out, and it is unnecessary to repeat them.

III. Had Congress power to make these changes?

The judicial power of the United States extends to *all cases* arising under the Constitution, laws, and treaties of the United States, and the appellate jurisdiction over all these cases, is to be exercised with such exceptions and under such regulations as Congress may make.

It is to be observed that the judicial power extends to cases, — not merely to particular questions arising in cases.

And no distinction is made by the constitution between the extent of the judicial power which may be exercised by courts of the United States having original jurisdiction conferred by Congress, by reason of the subject-matter of the case, and the extent of that power which may be conferred by Congress, to be exercised by an appellate court. If *the case* is within the judicial power of the United States, the power of Congress is as plenary to confer appellate power over the whole case, as to confer original jurisdiction over it. And from the origin of the government, appellate power has been conferred by Congress over entire cases (including all questions arising in them), which come within the judicial power of the United States, by reason of their subject-matter. This was true under the 12th section of the Judiciary Act of 1789, in reference to lands claimed under different States.

In Martin *v.* Hunter, 1 Whea. 349, Mr. Justice Story, speaking for the court, said: —

"This power of removal is not to be found in express terms in any part of the constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power. The power of removal is certainly not, in strictness of language, a grant of original jurisdiction; it presupposes an exercise of original jurisdiction to have attached elsewhere. The existence of this power of removal is familiar in courts acting according to the course of the common law, in criminal as well as civil cases, and it is exercised before as well as after judgment. But this is always deemed, in both cases, an ex-

ercise of appellate, and not of original jurisdiction If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power, and as Congress is not limited by the constitution to any particular mode or time of exercising it, it may authorize a removal either before or after judgment. The time, the process, and the manner, must be subject to its absolute legislative control. A writ of error is, indeed, but a process which removes the record of one court to the possession of another court, and enables the latter to inspect the proceedings, and give such judgment as its own opinion of the law and justice of the case may warrant. There is nothing in the nature of the process which forbids it from being applied by the legislature, to interlocutory as well as final judgment. And if the right of removal from state courts exists before judgment, because it is included in the appellate power, it must, for the same reason, exist after judgment. And if the appellate power by the constitution does not include cases pending in the state courts, the right of removal, which is but a mode of exercising that power, cannot be applied to them. Precisely the same objections, therefore, exist as to the right of removal before judgment, as after, and both must stand or fall together; nor indeed would the force of the arguments on either side materially vary, if the right of removal were an exercise of original jurisdiction. It would equally trench upon the jurisdiction and independence of state tribunals."

In Mayor *v.* Hooper, 6 Wal. 247, it was held that this power of removal on account of the subject-matter was plenary, and rested on the same ground as the 25th section of the act of 1789.

In Osborne *v.* Bk. of U. S. 9 Whea. 823, the meaning and extent of the constitution, and its inclusion of the entire case, if Congress saw fit to confer jurisdiction over it *as a case*, were demonstrated by Ch. Jus. Marshall, and his exposition of the plenary power of Congress over both original and appellate

jurisdiction in such cases has been deemed settled. (See Fiske *v.* Union Pa. R. R. 6 Blatch. 362; S. C. 8 Blatch. 243.) Unless therefore some distinction can be made between the power of Congress to confer original and appellate jurisdiction, and neither the constitution nor the decisions of this court permit this distinction, it is clear that Congress may confer appellate power over all cases to which the judicial power of the United States extends, and is not restricted by the constitution to particular questions, by reason of which the cases are brought within the judicial power of the United States. Nor is it essential to the grant of appellate power over the State courts in the cases enumerated in the constitution. that the State court should have actually decided some question under the constitution, laws or treaties of the United States against a right, title or immunity claimed under them or one of them. If this were essential, there could be no removal as provided by the 12th section of the judiciary act of 1789 or any of the subsequent statutes which have conferred the right to remove suits from State courts before trial on account of their subject-matter; all of which proceed on the assumption *that though the right of removal depends on the subject-matter, the State Court has not made any decision thereon.*

But it may be argued that if this court on a writ of error finds the State court has rightly construed the constitution, and each law or treaty under which the right, title, privilege or immunity is claimed, and has only decided erroneously on some other question of law on which that right, title, etc., depended, there can be no exercise of the appellate judicial power of the United States.

But this would make the jurisdiction to try and decide the case dependent, not on its subject matter, but on the decision of the appellate court in the exercise of its jurisdiction concerning that subject-matter. This is wholly inadmissible. When the case comes into this court it is within the judicial power of

the United States by reason of its subject-matter; and its subject-matter is not changed by any decision the court can make thereon.

It is submitted that by the act of 1867 Congress intended to confer on this court appellate power over the "case," and that it had constitutional authority so to do.

Respectfully submitted by

B. R. CURTIS,

Amicus Curiæ.

Murdock
v
City Memphis
No 106

Field J.

A CONSIDERATION

OF THE

Jurisdiction under the 25th Section of the Judiciary Act,

AS MODIFIED BY THE

2d Section of the Act of 5th February, 1867.

P. PHILLIPS.

Attorney and Counselor
of the Sup. Ct., U. S.

Polkinhorn. & Co., prs, Washington, D. C.

A CONSIDERATION

OF THE

Jurisdiction under the 25th Section of the Judiciary Act, as modified by the 2d Section of the Act of 5th February, 1867.

By request of several of the judges and as *amicus curiæ*, I respectfully submit, for their consideration, a response to the following questions propounded by the Court for discussion:

1st. Does the 2d section of the act of 5 February, 1867, repeal all or any part of the 25 section of the act of 1789?

2d. Is it the true intent and meaning of the act of 1867, that when this court has jurisdiction of a case by reason of any of the questions therein mentioned, it shall proceed to decide all the questions presented by the record which are necessary to a final judgment?

3d. If this question is answered in the affirmative, does the Constitution authorize Congress to confer such a jurisdiction?

First Question.

The act of 1867 is entitled an "act *to amend* the act of 24th September, 1789."

It contains two sections—the first relates to the regulation of the writ of *habeas corpus;* the second reënacts the provisions of the 25th section, with certain alterations, additions, and omissions.

Are these the result of accident in a mere attempt to transcribe the 25th section, or were they designedly made?

I find no debate on the adoption of this 2d section—I have learned nothing by enquiries made of members of Congress, to throw light on this subject. I know of no evil which called for redress by a new enactment.

On the other hand we look to the statutes themselves to gather the legislative intention. Not only have we the declaration in the title, that its object was "*to amend*, but we find the changes so numerous, and in one particular so radical, as to leave no doubt, that these changes were designed.

We point out some of these differences.

1ST. By the old act, this court could not proceed to final judgment and award execution, except in cases where the cause "had been once remanded before."

By the new act, this limitation is omitted, and the court is authorized in all cases at their discretion, to render judgment and award execution.

2d. By the old law the jurisdiction is vested in cases where is drawn in question the *construction* of any clause of the constitution or treaty, or statute, or commission.

By the new, we have the use of these other words, "or where any right, title, privilege or immunity is claimed," under the constitution, &c.

3d. By the old law it was required that the federal question must "appear on the face of the Record."

By the new, this requisition is omitted.

4th. By the old law, "no other error could be assigned or regarded as ground of reversal, than such as immediately related to the validity or construction of the Constitution, treaties, statutes, commissions, or authorities in dispute."

By the new, this limitation on the jurisdiction is entirely removed.

Referring to this last change, its operation is so important, and its bearing on the twenty fifth section is so direct, in a matter oftener discussed and decided by this court, than any question ever submitted to it; that it would be impossible to conclude that the legislator who drew the bill, and the legislature that adopted it, did not comprehend the radical change it effected.

Applying, then, to the act of 1867, the well ascertained rules of interpretation, we must come to the conclusion announced by the court in Stewart v. Kahn, that it is and was intended to be, a substitute for the twenty-fifth section of the judiciary act.

As to the *first* of the changes we have pointed out, no remark need be made, it speaks for itself.

As to the *second*, we do not clearly see that the words "right, title, privilege or immunity," necessarily enlarge the jurisdiction. These must all be derived from, or depend on, the constitution, laws, or treaties. This is the extent of the constitutional grant, and the twenty-fifth section covers the whole ground.

As to the *third*, we may remark that the omission referred to, leaves the court to adopt some rule, by which the jurisdictional question is to be presented. The act itself makes none.

The court had frequently decided that neither the

opinion of the court though required by State law to be filed in the cause, nor the certificate of the clerk under, direction of the judge when certified as part of the transcript, formed any part of the Record proper, for the purpose of ascertaining whether a federal question had been raised and decided. They gave to the words "on the face of the Record" a strict interpretation by confining the word "Record," to its technical definition.

Effect may be given to this change by enlarging the definition, and considering the Record to include everything certified by the direction of the judge as having transpired in the cause

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SECOND QUESTION.

Whether the act of 1867, was intended to authorize the court to adjudicate the whole case, where it obtains jurisdiction, by reason of a federal question, must necessarily be answered in the affirmative.

The act of 1867, like that of 1789, declares that the "final *judgment* or *decree*" of a State Court may be "*re-examined*, and *reversed*, or *affirmed*," upon a writ of error, "in the *same manner*, and under the *same regulations*, and the *writ shall have the same* effect, as if the judgment or decree complained of had been rendered or passed *in a Circuit Court.*"

The subject, thus placed under the jurisdiction—is a "*judgment*, or *decree.*" This is the determination of a court upon a cause considered by it. To review the judgment for the purpose of reversing or affirming,—the *whole cause* must be submitted to the Appellate Court. In the absence of statutory restriction, when a

court acquires jurisdiction, it extends its decision to all the matters litigated in the cause.

We are not, however, left in doubt as to this, because the words of both statutes are express—that the Appellate Court is to exercise its revisory power over the judgments and decrees referrred to, in the same manner as if they had been rendered by a Circuit Court.

As the new act changed the old, by repealing the provision which confined the court to the determination of Federal questions alone—it provides in its concluding sentence, that there is to be one difference between the exercise of the revisory power over a judgment of a State Court, and that of a Circuit Court, to wit: in the former, the Appellate Court may at their discretion proceed to a final decision and award *execution*, while in the latter by the twenty-fourth section, the court is required to send a mandate to the lower court to award execution.

Third Question.

Having concluded that the act of 1867, by just construction, authorises the Court to pass upon all questions which arise in a case submitted to its jurisdiction, we reach the final question, as to the constitutional validity of such an enactment.

In the constitutional grant, the power is extended to "*cases*" and "*controversies.*" These words are used as synonims, thus, "cases affecting ambassadors, &c;" while suits "between citizens of the same State claiming lands under grants of different States," fall under the classification of "controversies."

As a general rule, however, the word "controversies,"

is applied, to the jurisdiction which depends on the character of the parties—*i. e.*

Where the United States shall be a party;—

Between two or more States;—

Between a State and citizens of another State;—

Between citizens of different States;—

Between a State, or citizens thereof, and Foreign States, citizens, or subjects.

After this description in the first clause of the section the second vests original jurisdiction "in all *cases* affecting ambassadors, and *those* in which a State shall be a party," while in the first, where a State is a party, it is termed a "*controversy*."

Again, when conferring the appellate jurisdiction, it is thus given: "In all the *other cases before mentioned*, the Supreme Court shall have appellate jurisdiction." In this general reference, all the "controversies" are included in the word "cases."

Notwithstanding this, the word "case" includes a criminal as well as a civil proceeding, while the word "controversy" would seem to be alone applicable to the latter.

However this may be, we are now to deal with that portion of the grant which extends the jurisdiction "to all cases in law or equity, arising under the constitution, laws, or treaties." When that jurisdiction rests on the character of the parties, it has never been disputed that the whole case is revised in the Appellate Court. Where citizens of the same State claim lands under grants of different States, I assume that the same rule would apply, though the jurisdiction is here referable to the subject-matter.

The judicial power, as we have said, extends to all "cases in law and equity, &c.," when they arise under the constitution, &c.

When a party asserts his right before a court, in the forms prescribed by law, it then becomes "a case," to which the judicial power extends. This includes the right of *both* parties to the litigation; and the case may be said to "arise," whenever its correct decision depends upon the construction of the constitution, laws, or treaties.

If the Constitution had intended to confine and limit the jurisdiction, as is done by the twenty-fifth section, the appropriate language has not been used; as it stands, the power is not extended merely to *questions*, but to "*cases.*"

If the Constitution refered only to the former, then the restriction of the twenty-fifth section is mere surplusage.

The appellate power is given, subject "to such exceptions and regulations, as Congress shall make." In the exercise of this power, Congress, by the act of 1789, thought is advisable to confine the decision of this Court to certain *questions*. "No other error shall be assigned, or regarded, than such as immediately respects the before mentioned *questions.*"

When we strike from the statute, these restrictive words, the jurisdiction extends to the "case;" that is, to the *whole case*, and not a part of it.

"When, (say this Court,) the judicial power extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Court jurisdiction of that cause, although other questions of law and fact, may be involved in it." (Osborne v. Bank of United States. Mayor v. Cooper, 6 Wall. 252.)

In such a case, the revisory power would be co-extensive with the jurisdiction exercised by the Circuit Court. There would then seem to be no reason why Congress could not confer a similar revisory power over the judgments of State Courts.

Looking, therefore, to the new jurisdiction conferred by the act of 1867, the supervisory power is to be only exercised in the instances therein specified; when the case does not show that it is within the description, it will be dismissed. But where any of the designated matters have been decided, and in the manner described therein, the Court is, by the writ of error, fully possessed of the "*case*," and it must then proceed to dispose of it, in the same manner, as if the writ had brought up a judgment of the Circuit Court.

It may be that this result will produce some conflict of decision. This has not been altogether avoided heretofore.

The thirty-fourth section of the act of 1789, to a great extent, secures harmony between this, and the State Courts, by providing that in cases at common law, the laws of the several States shall constitute the rules of decision in the Courts of the United States. Increased efficacy has been given to this provision, by the adjudications of this court, maintaining that the construction given to the laws by the State Courts is obligatory.

We have, then, reached the conclusion (not without hesitation) that the Act of 1867 does extend the revisory jurisdiction of this Court, and that it is a Constitutional exercise of power.

Respectfully submitted,

P. PHILLIPS.

March 29, 1873.

Attorney and Counselor of the Sup. Ct., U. S.

21.598

No. 106.

Supreme Court of the United States.

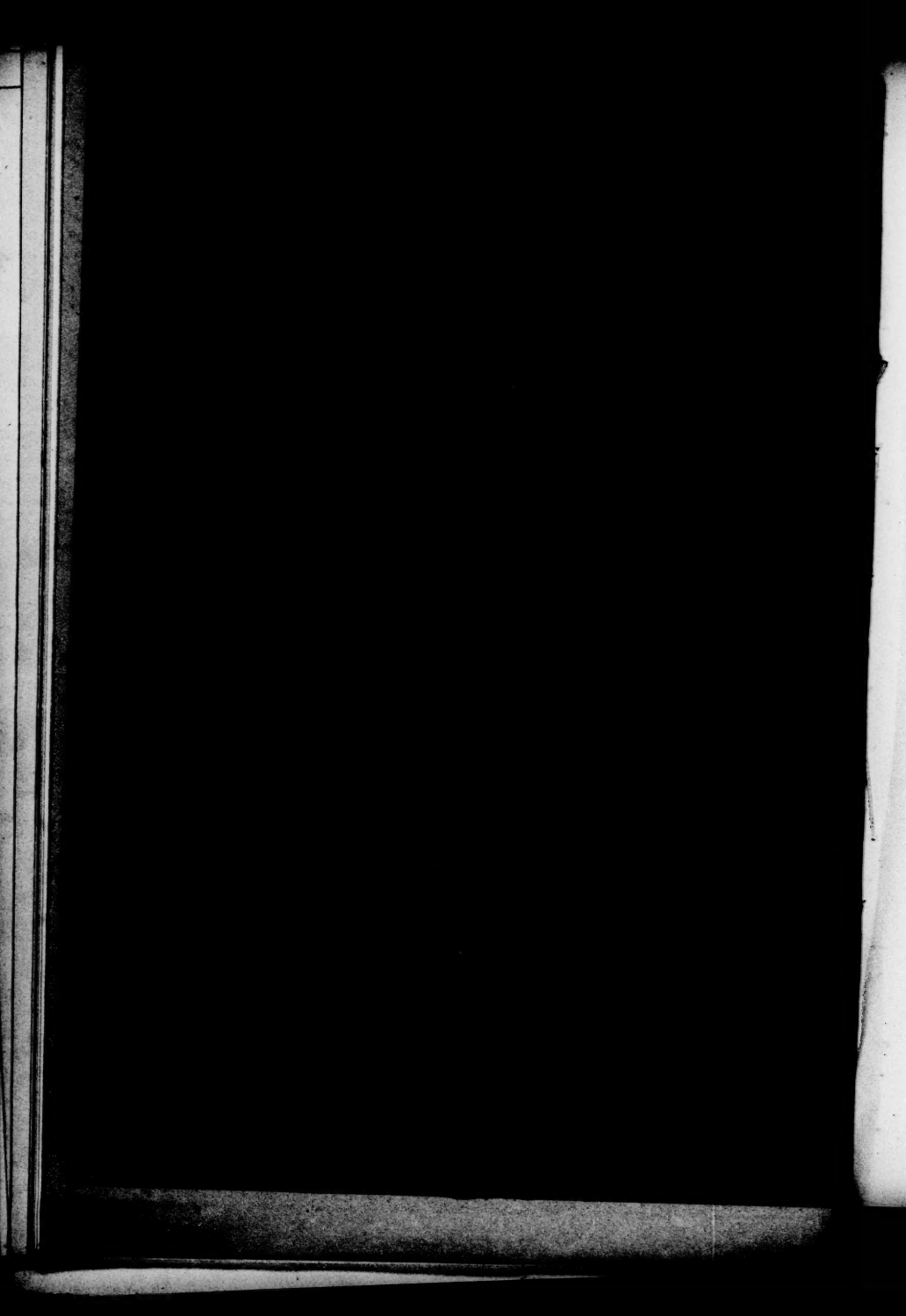
DECEMBER TERM, 1872.

Thomas Murdock, et. al., Appellants,

Versus

The Mayor and Aldermen of the City of Memphis.

J. B. HEISKELL, FOR APPELLANTS.



No. 106.

Supreme Court of the United States,

DECEMBER TERM, 1872.

THOMAS MURDOCK, ET. AL., APPELLANTS,

Versus

THE MAYOR AND ALDERMEN OF THE CITY OF MEMPHIS.

It is ordered that this case be re-argued on the first day of April next, on the following propositions:

1. Does the second section of the act of February 5, 1867, repeal all or any part of the 25th section of the act of 1789, commonly called the judiciary act?

2. Is it the true intent and meaning of the act of 1867, above referred to, that when this court has jurisdiction of a case, by reason of any of the questions therein mentioned, it shall proceed to decide all the questions presented by the record which are necessary to a final judgment or decree?

3. If this question be answered affirmatively, does the Constitution of the United States authorize Congress to confer such a jurisdiction on this court?

March 10, 1873.—True Copy:

D. W. MIDDLETON,
C. S. C. U. S.

Pursuant to the order of the court I proceed to argue the important questions presented in their order.

As to the question whether the 2d section of the act of Feb. 5, 1867, operates to repeal any part of the 25th section of the act of 1789, it may be considered 1st, upon the sense and reason of it, 2nd upon authority.

The first question that suggests itself, is as to the policy of the act of 1867, considered as a repeal of the restrictive portion of the act of 1789.

Cases may well be imagined in which the federal question has arisen, in which this court can see that great injustice has been done, but in which the court is shorn of its might by the fact that the state court has put the case upon a non-federal question, equally controlling, but clearly wrong. It might be, that when the case came on to be heard here, the State had repudiated the very doctrine on which the case had been decided, and that this court could see that their later holding was right, and yet this court would be bound under the act of 1789, to say we cannot do the justice in this case which a court of justice always desires to reach, because our jurisdiction falls short of the question on which the State court has determined the cause.

It cannot be denied, that in certain states of public sentiment, cases may arise in which justice requires that this court be vested with the extended power which the larger construction of the act of 1867 would give. While we may not attribute to the State courts the purpose of doing injustice, yet we cannot suppose them above all human infirmity, and a case may well be imagined in which even a court may be so far misled by prejudice or a state of political excitement, that it would, to avoid a reversal in this court, decide a case on grounds outside of the federal question, and in such manner that the jurisdiction of this court might be defeated.

Surely, it is not an unwarrantable supposition, that the Congress of the United States, after the war between the States, and when the passions of the hour had not subsided, thought it prudent to provide against such an event.

Now to take a common sense view of the question, if I say to my boys you may all go to town except Charlie, and

afterwards say you may all go, certainly that repeals the exception. If I say that they may all go and do whatever the other boys do, except that they must not go to the Bal Masque, and afterwards give them permission to do whatever the others do, it would certainly repeal the exception.

Now it is impossible for any one to read the act of 1789, with its restrictive clause, and the act of 1867, without it, and say that they mean the same thing. We must then conclude either that a change was intended or that the law was re-enacted without any purpose of change and by inadvertance the last, very important clause, was omitted. It is to be observed that in most particulars the section in question is a mere re-enactment of the corresponding section in the act of 1789, yet there are several variations between the 25th section of that act and this section of the act of 1867 other than the one to which our attention is specially directed. If there is an adequate motive in the other changes for the re-enactment of this law, the doubt which would naturally arise from the want of any other motive than this particular change may be weakened; but if we find this a change more important than any other, or that the others have a motive wholly inadequate to bring about a re-enactment of what had stood for seventy eight years as the basis of this part of our judicial system, or if we find that whatever alteration the foregoing part of the act may make the tendency and purpose of it concurs with the tendency and purpose of this, if it intends a change, but is wholly inconsistent with it in any other view; in these events we may well conclude that the change is intentional.

I do not mean to overlook the fact that inadvertance in so important a step, is not to be attributed to a legislative body, (See Ellis vs. Page, 1 Pick. 45,) particularly of so high a character as the Congress of the United States, but to show that independent of the presumption the reasons are insuperable against the idea that this was not one of the principal changes intended.

The most of the changes made in the foregoing part of the section are scarcely material at all. The changes occur in two modes, by omission, and substitution. The substitution of the word *immunity* for *exemption* is entirely immaterial. Nor can the words omitted materially change the sense. The omission of "law or equity" follow-

lowing the word, court, is wholly immaterial, as they had been held to apply to and cover criminal courts, and so were not restrictive. "*Where is drawn in question the construction of any clause of the Constitution, or of a treaty or statute of, or commission, held under the United States*, and the decision is against the title, right, privilege or *exemption* specially set up or claimed under such *clause of* the Constitution, treaty, statute or commission," is the same in substance with "*where any title, right, privilege or* immunity *is claimed under the Constitution, or any treaty or statute of, or commission held*, or authority exercised, *under the United States*, and the decision is against the title, right, privilege, or *immunity* specially set up or claimed by either party under such Constitution, treaty, statute, commission *or authority*."

If any substantial difference can be found, it is in the direction of enlarging the jurisdiction. We may well suppose cases in which the *construction* of the Constitution is not drawn in question, in which yet a right is claimed under the Constitution. Yet we cannot imagine a case *where the right is claimed*, in which, the constitution, if it came to be construed, would not be open for construction under the law as it now stands. This change, then, though not very important, is in extension of the jurisdiction. The insertion of the words "*or authority exercised*," can hardly cover any case not previously included, yet it manifests the intent to enlarge the jurisdiction by saving every possible question, and disposing of every possible doubt.

But there is another omission of very important words found in the act of 1789, c. 25, and omitted in the act of 1867. It is in the clause as to remanding causes. The act of 1789 contains these words, "except that the Supreme Court, *instead of remanding the cause for a final decision, as before provided*, may at their discretion, *if the cause shall have been once remanded before*, proceed to a final decision of the same, and award execution.

Now in the act of 1867 the words in italics are omitted, and of these while the first omission does not alter the sense, as the words are clearly redundant, yet the latter omission is of the most essential and significant character, extending the powers of the court to a compulsory process in the first instance, instead of requiring it to resort to it only upon one failure.

So that in every portion of this act we see one consistent purpose carried out with the utmost care, and the most perfect appreciation of every phrase and word inserted, left or struck out. In no one case is the sense marred, as it would easily have been by a blunderer or a fool. The mazes of these intricate sentences are not threaded by blind men or men without definite design or purpose, to produce, *vestigia*, so symetrical and results so perfect. As well suppose that accident has written in the indelible records of geology, falsehoods to mislead mankind, as that accident arranged these words, these changes. The evidences of design are as perfect and conclusive in regard to this statute as in the admirable work of Arch-deacon Paley are the evidences of design in the instance of the watch, the illustration on which he builds his theory of Natural Theology.

We come then to the principal clause, the subject of this argument, which in the act of 1867 declares that the judgment may be re-examined and reversed in the same manner and under the same regulations, and the writ (of error) shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States.

Now when we look to the effect of a writ of error to a court of the United States, it is hardly necessary to say that it is not confined to any class of questions, but extends to any material thing in the case in which error has intervened. The act then, in its terms, declares that the writ of error shall have the the same effect it has, in cases where it is admitted that it reaches every question as to which there exists any material error.

Is it possible to say that this has the same meaning it would have if it went on to set up an exception which would exclude from consideration a majority of the questions which arose in a majority of the cases in which the writ of error lies? The clause with the exception, and the clause without the exception, clearly have meanings materially and glaringly different and inconsistent. They cannot, then, stand together, and so one or the other must give way. If they can both stand, and be reconciled, then your honors can decide for us that we can have this case revised on its whole merits and recover our lands, and for defendants that you will not go beyond the Federal question, and so perhaps are restrained of your

liberty to do justice to my clients. If these things cannot both be done, then these two clauses are not consistent, and the enactment of one must operate as a repeal of the other.

The authorities fortify these views.

In the case of Davis vs. Fairbairn, 3 How., U. S. 646, the point is this: "The act of 20 Dec. 1802, concerning the relinquishment of dower in the 2d section, provides that dower may be relinquished before two justices of the peace when the parties reside out of the commonwealth, and the *clerk of the county is required to certify* that the persons taking the acknowledgment were justices, &c. This provision is *repugnant* to that of the act of 1785, which requires a *commission* to be issued to such justices."

Now, here the issue of a commission and the certificate of the character of the commissioners, might well be held to be consistent with each other, and on a strained construction it would have been easy to hold that the technical rule disfavoring repeals was controlling, yet it was evident that the Legislature did not intend both to stand, so the court hold that the repugnancy exists which the rule requires. It is to be observed that this follows immediately after the statement of the rule as strongly stated in Wood vs. U. S., 16 Peters 362. "It is not sufficient that subsequent laws cover some or even all of the cases provided for by it, for they may be merely affirmative, cumulative or auxiliary, but there must be a positive repugnancy between the provisions of the new laws and those of the old."

In the present instance the repugnance is much more positive than in the instance given. For there the laws may be reconciled as cumulative. But a jurisdiction to hear *a case* as it would be heard on error from the circuit court, cannot be reconciled with a restricted jurisdiction to hear *certain questions* in the case, as they would be heard on error from the circuit courts. This repugnancy is more apparent and clear, and this case is a *fortiori*, a repeal.

In the case of Norris vs. Croker, 13 How. 439, in regard to the repeal by implication of an act giving remedy in respect of fugitive slaves, Judge Catron said: "The recent statute covers every offence found in the former act, which subjects the offender to a penalty of $500, and presents a new and different penalty recover-

able by indictment, and a penalty repugnant to the act of 1793. * * * * The former act imposes a penalty of $500 in the enumerated cases, regardless of any actual loss on the part of the owner, whereas for the same offences, the act of 1850, allows civil damages of one thousand dollars for each slave lost, but nothing where he is regained, loss being the ground of action." The act of 1793 was therefore held to be repealed.

Wilde J. in Ellis vs. Page, 1 Pick 45, cited by Swayne, J., in Stewart v. Kahn, says: "It is a well settled rule that when a statute is reversed or one act framed from another, some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled. To hold otherwise would be to impute to the Legislature gross carelessness or ignorance, which is altogether inadmissable. We are not therefore at liberty to suppose that the process or execution in the provincial statute was omitted by mistake, and if not then clearly, it was the intention of the Legislature to place all parol demises on the same footing, for such is the obvious import of the language of the statute of frauds. See also 5 Pick. 168. Where the Legislature impose a second penalty for an offence, whether smaller or a larger, than the former a party cannot be allowed to sue on one or the other at his option." 4 Burr, 2026, supports this position fully.

In New York, it has been held that:

"A subsequent statute, revising the whole subject matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on the principles of law, as well as in reason and common sense, operate to repeal the former*; according to the case of The King vs. Cator, 4 Burr, 2026, in which it was decided that a former statute, inflicting a penalty of £100 and three months' imprisonment on persons enticing away artificers, was virtually repealed by a subsequent statute inflicting £500 penalty and twelve months' imprisonment for the same offense. The same principle was adopted in the case of The King vs. Davis, 1 Leach's Cases, 306. All the subject matter of the act of 28 Geo., 2, is contained in the statute of 1785. A part only of its restrictions and limitations, in the second section,

*These are the very words of the court in 12 Mass., 563.

is omitted in the latter; and it is very obvious, by comparing them, that the Legislature considered the latter as a complete substitute and repeal of the former. 12 Mass., 563.

"The latter act was intended as a revision of all the laws upon the subject of taxation; and it was obviously the intention of the Legislature to embrace in it either in terms, or by reference, all the subsisting legal provisions on that subject. * * * * * * * * * * * * * * *

The language of the 14th section is as broad and comprehensive as it is capable of being made; and in terms renders the real and personal estate of *all manufacturing companies* subject to taxation." 4 Cowen, 557.

In Kentucky;

Since, then, the 20th section of the act of 1802, interpreted according to its own terms, imports a substantial grant of power, and of all the power that the county courts were intended to have on the subject, and since it would be useless and without effect, unless thus understood as regulating the whole subject of the removal of jailors by the county court, we feel bound to give it this interpretation; and therefore to conclude, that after that act took effect, the county courts had no other power of removing jailors, but that which the 20th section confers; of removing them whenever it shall appear to the court that such jailors have been guilty of neglect of duty.

If this 20th section had been the first and only enactment on the subject, all must have concurred in the conclusion, that it was intended to regulate the whole subject, and that it granted all the power which the court was intended to have. The difficulty or rather embarrassment in the case, arises from the fact that a previous law had given to the same grantee unlimited power on the same subject, and that this 20th section makes no reference to the previous law, and contains no express words of restriction or change, but granting an express and limited power, is framed as if it were the first and only act on the subject. But do not these circumstances indicate that it is to be construed as if it were the only act on the subject? Or shall the first act, which is inferior in authority so far as they conflict, so far affect the construction of the last as to deprive it of all effect? We say the last act

must have effect according to its terms and its obvious intent. And as both cannot have full operation according to their terms and intent, the first and not the last must yield. 6 B. Monroe, 154.

In Wakefield vs. Phelps, 37 N. Hamp., 289, the court say in argument: "Where by an act it is apparent that the Legislature intended to revise a statute, the former statutes upon the subject, so far as in conflict with the last, are no longer in force, though not expressly repealed," (citing,) Towle vs. Mussett, 3 Greenl., 22. Nichols vs. Squire, 5 Pick., 168. King vs. Cator, 4 Burr, 2026. King vs. Dennis, 1 Leach, 306.

The court then proceed to quote the rule stated in Bartlett vs. King, 12 Mass., 565, as already quoted in the case in 4 Cowen, and further say: "where the entire provisions of a statute are revised by a subsequent act, such provisions are repealed by the latter statute," (citing,) Leighton vs. Walker, 9 N. H., 59. Sumner vs. Stewart, 2 N. H., 42.

In Alabama, the court, in the case of George vs. Skeates & Co., say: "by the act of the 3d of February, 1848, it is enacted, that all liens upon steamboats for furnishing materials, labor or stores, shall cease to exist, unless the same shall be enforced within six months after such materials, labor or stores, shall have been furnished. It was the manifest intention of the Legislature to allow to all who might have liens upon boats, six months within which to enforce them; and this intention, which we must carry out, is directly repugnant to that portion of the act of 1836 requiring such liens to be enforced on or before the first day of July next following the furnishing of the materials, labor or stores, whereby the liens arose. Under the act of 1836, some creditors might have nearly a year within which to enforce their liens, whilst others might have but a few days. This is plainly repugnant to the intention of the act of 1848, which allows to all six months, and six months only, within which their liens must be enforced; and as the intention of the act of 1848 is plainly repugnant to that portion of the act of 1836 to which we have referred, we must give effect to the act of 1848, at the expense of the act of 1836. It is true that courts will not construe a prior act to be repealed by a subsequent one, in the absence of express words of repeal, unless the provisions of the subsequent act are directly repugnant to the

former. But when such repugnancy exists, the latter must prevail, and the consequence is, that the former is repealed to the extent that the provisions of the two acts are inconsistent with each other."

In the Ill. and Michigan Can. Co. vs. City of Chicago, 14 Ill., 336, the court use almost the same language in substance used by the court in Bartlett vs. King, 12 Mass., 537, citing that case and others, and holding that a law there was repealed by a later law, not more repugnant to the former than the one in question here.

In addition to all these, Mr. Justice Swayne in Stewart vs. Kahn, 11 Wallace, 502, quotes the language of the court in Bartlett vs. King's Exrs, 12 Mass., 537, and adopts it as the rule to control the construction of the very statute now under consideration.

II.

The second question, as to what is the true intent and meaning of the act of 1867, may be regarded as having been fully considered already.

If the former act has been repealed in part by the latter, it was either to make a new rule different from the rule that existed before, or to leave it as it was. Of these hypotheses, the latter is evidently untrue. Now, if a change was intended, what change is it which was intended? Of course that which the language expresses. But the language declares that the *judgment may be re-examined and reversed or affirmed in the same manner and under the same regulations, and the writ of error shall have the same effect*, as if the judgment or decree complained of had been rendered or passed in a court of the United States. I know of but one way to come at the intent and meaning of a statute which is unambiguous, and that is to follow its language. Here the language is plain, but it is not of itself an expression of the rule. It refers to a standard established. If that standard is certain, then this language, *certum reddi potest*. Now refer to the standard, and we see that when a case comes by writ of error from the circuit court of the United States, or any court of the United States, to the Supreme Court, it is re-examined and reversed or affirmed under certain regulations; one of which is, that any question material to the merits of the cause may be examined, and the cause affirmed

or reversed, according as the court has avoided or committed error on that point, and that without any restriction as to whether the question is the *casus fœderis* or not. We find that the writ of error, to one of the courts of the United States, has the effect to bring before the court all the material questions, without restriction to the federal question, as above. Having applied the standard, and found it capable of measuring the breadth of the jurisdiction, what is left, but to hold that the language is certain, and its true intent and meaning ascertained. If it is to have the same effect, it cannot be restricted to the federal question, for that is to give it a different effect, and the effect cannot be the same and different.

I conclude then, that it is the true intent and meaning of the act of 1867, that when this court has jurisdiction of a case, by reason of any of the questions therein mentioned, it shall proceed to decide all the questions presented by the record which are necessary to a final judgment or decree.

III.

I proceed then to consider the question: does the Constitution of the United States authorize Congress to confer such a jurisdiction on this court?

The Constitution provides that the courts of the United States, shall have jurisdiction of *all cases arising under the Constitution and laws of the United States*. If the makers of that Constitution had intended to eliminate *questions* from *cases*, and to submit only *questions* arising in *cases*, they would have been competent to express clearly that idea as a constitutional requirement, as the same men in drawing the act of 1789, not only in the twenty-fifth section, but in the twelfth section, providing for titles arising under grants from several states, clearly did express that idea, as a statutory requirement, and segregated federal questions, declaring that errors should not be assigned on any other question, and that a claim of title under another state, should be transferred to the federal courts only on condition that no defense but that title should be set up. When, therefore, we find them declaring that the judicial power shall extend to *cases*, not to *questions arising in cases*, we must suppose that they mean what they clearly express, and

not another and different thing which they did not express.* To use the words of Mr. J. Story, in an other connection: "It is delegated in the most general terms, and may therefore be exercised under the authority of Congress under every variety of form of original and appellate jurisdiction. There is nothing in the instrument which restrains or limits the power, and it must consequently subsist in the utmost latitude of which it is in its nature susceptible." Story on Const. §§1787, 1732.

In the debates on the Constitution, those who advocated the Constitution, did not pretend that it was perfect in its guarantees or exact in its language. When this very clause was objected to as vague, no one pretended to say that it did not have the broadest construction its objectors attributed to it. On other points they relied on the power of Congress to make exceptions. That Congress then, in conferring the jurisdiction in 1789, did make these exceptions, does not prove that they did not regard themselves as having the power to confer the jurisdiction without the exceptions, but simply that the restrictions were necessary to prevent the power by operation of the Constitution from being extended to the utmost limit which it is capable. Mr. Story, (Com. on Const., § 1773, says: "The appellate powers of the Supreme Court are not *given* by the judicial act (1789,) they are *given* by the Constitution; but they are *limited* and *regulated* by that act and the other acts on the same subject."

Mr. Story, in his commentaries on the Constitution, § 1646, says: "Another inquiry may be what constitutes a *case* within the meaning of the clause. It is clear that the judicial department is authorized to exercise jurisdiction to the full extent of the Constitution, laws and treaties of the United States, whenever any question respecting them shall assume such a form that the judicial power is capable of acting upon it. When it has assumed such a form, it then becomes a *case*, and then and not till then, the judicial power attaches to it. A case then, in the sense of this clause of the Constitution, arises when some subject touching the Constitution, laws or treaties of the United States is submitted to

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*This mode of reasoning has many judicial precedents. Suggesting a different expression from that used, "Ch. J. Marshall says this language would have suggested itself to statesmen," &c. 5 Pet., 18.

the courts, by a party who asserts his rights in the form prescribed by law. In other words, a *case* is a suit in law or equity, instituted according to the regular course of judicial proceedings, *and when it involves any question arising under the Constitution, laws or treaties of the United States,* it is within the judicial power confided to the Union." At this point he cites 2 Elliotts Deb. 418, 419, the same I have quoted on page 23 of this brief to show the latitudinous character of the power.

In Cohens v. Virginia, 6 Wh., 101, Marshall, C. J. says: "A case in law or equity, consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either."

In the same case, p. 116, he says: "The article does not extend the judicial power to every violation of the Constitution which may possibly take place, but to a *case* in law or equity in which a right under such law is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a *case* arising under the Constitution, to which the judicial power would extend. The same observations applies to the other instances with which the counsel who opened the cause has illustrated this argument. * * * They do not show that there can be a "case in law or equity arising under the Constitution to which the judicial power does not extend.'"

"Is a writ of prohibition a *suit?* The term certainly is a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice, which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit." Weston vs. City of Charleston, 2 Pet., 464.

"A case is a controversy between parties which has taken a shape for judicial decision." Marshall's speech; 5 Wh; App. p. 16; cited in Story on Const., note to § 1646.

The general declaration that "the judicial power shall extend to *all cases* arising under the Constitution and laws of the United States," etc., applies to all courts as well of original as of appellate jurisdiction. It is applied to this appellate jurisdiction by a subsequent clause, which refers to the former, and uses no new words of restriction. We may therefore assume that the potential extent of the appellate jurisdiction in this direction is the same as the extent of the judicial power, and applies to *cases* in the same sense as the original jurisdiction does. Now we may suppose that when the Convention provided for original jurisdiction of *cases* arising under the Constitution and laws of the United States, they did not intend that this original jurisdiction should be exercised piece-meal, but they intended that if any provision was made by law for vesting such a jurisdiction in a court of original jurisdiction, it should give jurisdiction of *cases*. It would be a strange construction of the Constitution if it were held that under this clause a court of original jurisdiction might be authorized to assume jurisdiction of cases which arose under the Constitution and laws of the United States, the so arising being the jurisdictional fact, and that yet when they so obtained jurisdiction of the *case* they could determine nothing but the naked question so arising under the Constitution and laws, and must remit the case thus partly determined to some other tribunal having jurisdiction of the other questions involved. Certainly the power was conferred to grant such original jurisdiction to the circuit courts. Certainly it was never contemplated that the question should in all cases be eliminated and tried without the case. Certainly, this being the jurisdictional fact, in a class of cases it would have been within the grant of the judicial power, and it would not be extending it beyond *cases arising* under the Constitution and laws, though the cases might necessarily involve many other questions.

A large class of cases of this character has been placed on the statute books recently, about which it is believed no serious question has been made.

If these enactments are valid and within the power, then the same construction must extend to the appellate power, else we might have an anomalous condition of things—*i. e.*, a circuit court with unrestricted power to try cases involving the Constitution

and laws, with all the incidental questions, and an appellate power, defined by the same words, in the same instrument, and extending to the same cases, which yet could not consider the cases, but only certain questions arising in the cases. But such a conclusion is not to be tolerated. It results that the restriction, if any, must apply to the circuit courts, and that they must be confined to the federal questions in cases pending before them, or else the Supreme Court must be *capable* of general jurisdiction not of the federal *question* only, but of the *cases* in which the question is involved.

Chief Justice Marshall, in Osborne vs. Bk. of U. S., 9 Wh., 818, 819, quoted by Mr. J. Story in his Commentaries on the Const., §1651, says: "we perceive, then, no ground upon which the proposition can be maintained that Congress is incapable of giving the circuit courts original jurisdiction in any case to which the appellate jurisdiction extends." He therefore regards the converse of the proposition above stated as true, or rather he assumes the very proposition above asserted that the extent of the jurisdiction in the two cases is the same.

In the same case he says: "The third article of the Constitution declares, that the judicial power shall extend to all cases in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made under their authority."

"This clause *enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws and treaties* of the United States, *when any question* respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes *a case*, and the Constitution declares that the judicial power shall extend to *all cases* arising under the Constitution, laws and treaties of the United States.

"The suit of the Bank of the United States vs. Osborne and others, is a case, and the question is, whether it arises under a law of the United States?

"The appellants contend that it does not; because several questions may arise in it which depend on the general principles of the law, not in any act of Congress.

"If this were sufficient to withdraw a case from the jurisdiction of the federal courts, almost every case, although involving the construction of a law, would be withdrawn; and a clause in the Constitution relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case every part of which depends on the Constitution, laws, or treaties of the United States. The question whether the fact alleged as a foundation of the action be real or fictitious; whether the conduct of the plaintiff has been such as to entitle him to maintain his action; whether his right is barred; whether he has received satisfaction, or has in any manner released his claims, are questions, some or all of which may occur in every case; and if their existence be sufficient to arrest the jurisdiction of the court, words which seem to be intended to be as broad as the Constitution, laws and treaties of the Union—which seem designed to give courts of the government the construction of all its acts, so far as they affect the rights of individuals, would be reduced to almost nothing.

"In those cases in which original jurisdiction is given to the Supreme Court, the judicial power of the United States cannot be exercised in its appellate form. In every other case, the power is to be exercised in its original or appellate form, or both, as the wisdom of the Congress may direct. With the exception of those cases in which original jurisdiction is given to the court, there is none to which the judicial power extends, from which the original jurisdiction of the inferior courts is excluded by the Constitution. Original jurisdiction, so far as the Constitution gives a rule, is coextensive with the judicial power. We find in the Constitution no prohibition to its exercise in every case in which the judicial power can be exercised. It would be a very bold construction to say that this power could be applied in its appellate form only, to the most important class of cases to which it is applicable.*

"The Constitution establishes the Supreme Court, and defines its jurisdiction. It enumerates cases in which its jurisdiction is

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*It would be equally bold to assert that the power did not exist in Congress to make the appellate power apply to every case to which it was allowed to apply the original jurisdiction. The same reasoning applies to the succeeding propositions.

original and exclusive; and then defines that which is appellate; but does not insinuate that, in any case, the power cannot be exercised in its original form by courts of original jurisdiction. It is not insinuated that the judicial power, in cases depending on the character of the cause, cannot be exercised in the first instance in the courts of the Union, but must first be exercised in the tribunals of the State;—tribunals over which the government of the Union has no adequate control, and which may be closed to any claim asserted under a law of the United States.

"We percieve, then, no ground on which the proposition can be maintained, that Congress is incapable of giving the circuit courts original jurisdiction in any case to which the appellate jurisdiction extends.

"We ask, then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction—provided the facts necessary to support the action be made out—then all the other questions must be decided, as incidental to this, which gives jurisdiction. Those other questions cannot arrest the proceedings. Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to *a whole case* as expressed by the Constitution, but to those parts of cases only which present the particular question involving the construction of the Constitution or the law. We say it never can be extended to the whole case, because, if the circumstance that other points are involved in it shall disable Congress from authorizing the courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those courts to take jurisdiction of the whole cause, on appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim

rights under the Constitution, laws or treaties of the United States, a trial in the federal courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given by another tribunal, into which he is forced against his will.

"We think, then, that when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or law may be involved in it." 9 Wheaton, 819, 823.

This whole extract is so apposite to the question before this court, that no part of it can well be spared.

In Durosseau vs. The U. S., 6 Cr., 307, the same Judge had said: "The third article of that instrument commences with organizing the judicial department. It consists of one Supreme Court, and of such inferior courts as Congress shall, from time to time, ordain and establish. In these courts is vested the judicial power of the United States.

"The first clause of the second section enumerates the cases to which that power shall extend. The second clause of the same section distributes the powers previously described. In some few cases the Supreme Court possesses original jurisdiction. The Constitution, then, proceeds thus: "In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and to fact, with such exceptions, and under such regulations, as the Congress shall make."

"It is contended that the words of the Constitution vest an appellate jurisdiction in this court, which extends to every case not excepted by Congress; and that if the court had been created without an express definition or limitation of its powers, a full and complete appellate jurisdiction would have vested in it which must have been exercised in all cases whatever. The force of this argument is perceived and admitted. Had the judicial act created the Supreme Court without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the Constitution assigned to it. The Legislature would have exercised the power it possessed of creating a Supreme Court, as ordained

by the Constitution; and, in omitting to exercise the right of excepting from its constitutional powers, would have necessarily left those powers undiminished. The appellate powers of this court are not given by the judicial act. They are given by the Constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject.

"When the first Legislature of the Union proceeded to carry the third article of the Constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the Supreme Court. They have not, indeed, made these exceptions in express terms. They have not declared that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.

"The appellate power is not limited by the terms of the third article to any particular courts. The words are, 'the judicial power, (which includes the appellate power,) shall extend to all cases,' etc., and in all other cases before mentioned, the Supreme Court shall have appellate jurisdiction. It is the *case*, then, and and not the court that gives the jurisdiction. If the judicial power extends to the case, it will be vain to search in the letter of the Constitution for any qualification as to the tribunal where it depends." Marshall, J., in Martin vs. Hunter, 1 Wh., 338, quoted in Story on Const., §1733. I may add, it will be equally vain to search in the letter of the Constitution for any qualification as to the *question* to be determined when the case is made for the exercise of jurisdiction. "It must therefore be conceded, that the Constitution not only contemplated, but meant to provide for cases within the judicial power of the United States, which might yet depend before State tribunals." Ib.

"It will be observed that there are two classes of cases enumerated in the Constitution, between which a distinction seems to be drawn. The first class includes cases arising under the Constitution, laws and treaties of the United States;—cases affecting ambassadors, other public ministers and consuls, and cases of admiralty and maritime jurisdiction. In this class the expression is, the judicial

power shall extend to *all cases;* but in the subsequent part of the clause, which embraces all the other cases of national cognizance, and forms the second class, the word "*all*" is dropped seemingly *ex industria.* Marshall, C. J., in Martin vs. Hunter, 1 Wh., 333, 334, quoted in Story on Const., §1748.

Mr. Story, in his Commentaries on the Constitution, §1702, says: "It is clear from the language of the Constitution, that in one form or the other, it is absolutely obligatory upon Congress to vest all the jurisdiction in the national courts in that class of cases at least where it has declared that it shall extend to 'all cases.'"

"This imperative sense of the words "shall extend," is strengthened by the context. It is declared that in all cases affecting ambassadors, etc., the Supreme Court shall have original jurisdiction. * * * The clause proceeds, "in all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as Congress shall make." The very exception here shows that the framers of the Constitution used the words in an imperative sense. What necessity could there exist for this exception, if the preceding words were not used in that sense! Without such exception, Congress would, by the preceding words, have possessed a complete power to regulate the appellate jurisdiction, if the language were only equivalent to the words, may have appellate jurisdiction. It is apparent, then, that the exception was intended as a limitation upon the preceding words, to enable Congress to regulate and restrain the appellate power as the public interests might, from time to time, require." Martin vs. Hunter, 1 Wh., 337.

The history of this clause is this: The 13th clause of the original project of a new government, as stated by Luther Martin in his report to the Maryland Legislature, proposed that the jurisdiction of the national judiciary shall extend to cases which respect the collection of the national revenue; cases arising under the laws of the United States; impeachments of any national officer, and questions which involve the national peace and harmony. See Yates' Minutes, p. 5. It is otherwise reported in Elliot's Deb. vol. 4, p. 77.

Luther Martin, in the same book, p. 45, says of the federal courts: "These courts, and these only, will have a right to decide upon the

laws of the United States, and all questions arising upon their construction, and in a judicial manner to carry these laws into execution."

Mr. Edmund Randolph's draft, 9 Res., Elliot's Deb., p. 42, did not contain the provision as to cases arising under the laws of the United States, May 29, 1787, but it appears that it was introduced in the Committee of the whole. Ib. 77, 103.

Mr. Charles Pinckney's draft, Art. ix, 4 Elliot's Deb., p. 47, contains this feature as particularly vested in the Supreme Court, "whose jurisdiction shall extend to all cases arising under the laws of the United States," but this jurisdiction to be only appellate.

Mr. Patterson's draft gives the jurisdiction in all cases "which may arise on any act or ordinance of Congress for the regulation of trade or the collection of the federal revenue." Elliot, 71.

The resolutions as submitted by Mr. Randolph, and altered, amended and agreed to in Committee of the whole, pp. 41, 42, 76, 77. does not contain the clause, but as referred on the 26th of July, 1787, to a Committee of detail; it is, Res. 16, p. 115, and in these words: "That the jurisdiction of the national judiciary shall extend to cases arising under laws passed by the general legislature, and to such other questions as involve the national peace and harmony."

This, as returned by the Committee, Aug. 6, 1787, 4 Elliot's Deb., p. 12, Art. xi, s. 3, begins: "The jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States."

It next appears in its present form in the report of the Committee of revision. Elliot's 4 Deb., 192.

In Martin vs. Hunter, 1 Wh., 351, Marshall, C. J., speaking of writs of error, to the State courts, says: "Strong as this conclusion stands, upon the general language of the Constitution, it still may derive support from other sources. It is an historical fact, that this exposition of the Constitution, extending its appellate power to State courts, was previous to its adoption uniformly, and publicly avowed by its friends and admitted by its enemies as the basis of their respective reasonings, both in and out of the State conventions. It is an historical fact, that at the time when the judiciary act was submitted to the deliberations of the first Congress, composed, as it was, not only of men of great learning

and ability, but of men who had acted a principal part in framing, supporting or opposing that Constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It is an historical fact, that the Supreme Court of the United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases brought from the tribunals of many of the most important States in the Union, and that no State tribunal has ever breathed a judicial doubt on the subject or declined to obey the mandate of the Supreme Court, until the present occasion. This weight of contemporaneous exposition by all parties, this acquiescence of enlightened State courts, and these judicial decisions of the Supreme Court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremedial doubts."

Chief Justice Marshall had been a member of the Constitutional Convention and defended this Constitution in the Virginia Convention, and had said: "Congress is empowered to make exceptions to the appellate jurisdiction as to law and fact of the Supreme Court." These exceptions certainly go as far as the Legislature may think proper for the interest and liberty of the people. 2 Elliot's Debates, 403.

In the debates on the Constitution, Mr. Madison said, in the Virginia Convention, Elliot's Deb., 390, "that causes of a federal nature will arise will be obvious to every gentleman who will recollect that States are laid under restrictions and that the rights of the Union are secured by these restrictions. * * * With respect to the laws of the Union, it is so necessary and expedient that the judicial power should correspond with the legislative, that it has not been objected to."

Mr. Pendleton, in the same discussion, p. 381, refers to the discretionary powers of Congress to make exceptions and regulations, for obviating much that would be objectionable, in regard to the appellate jurisdiction of the court.

Mr. Grayson, p. 414, 415, says: "The jurisdiction of all cases arising under the Constitution and the laws of the Union is of stupendous magnitude. It is impossible for human nature to trace its extent. It is so vaguely and indefinitely expressed that its lati-

tude cannot be ascertained. * * * * But this is with such exceptions and under such regulations as Congress shall make. This, we are told, will be ample security; Congress may please to make these exceptions, but they may not, also."

Gov. Randolph, p. 419, says: "With respect to that part which gives appellate jurisdiction both as to law and fact, I concur with the honorable gentleman who presides, that it is unfortunate, and my lamentation over it would be incessant were there no remedy. * * * My objection would be unanswerable were I not satisfied that it contains its own cure in the following words: 'with such exceptions and under such regulations as Congress shall make.' * * * Congress can regulate it properly, and I have no doubt they will."

In a previous part of his argument, pp. 418, 419, he had said: "It is then necessary that its jurisdiction should extend to all cases in law and equity arising under this Constitution and the laws of the United States. * * * Although I do not concur with the honorable gentleman, that the judiciary is so formidable, yet I candidly admit that there are defects in its construction; among which may be objected too great an extension of jurisdiction. I cannot say by any means that its jurisdiction is free from fault, though I conceive the subjects to be proper. It is ambiguous in some parts and unnecessarily extensive in others. It extends to all cases in law and equity arising under the Constitution. What are these cases in law and equity? Do they not involve all rights from an inchoate right to a complete right arising from this Constitution? * * * What do we mean by the words, '*arising* under the Constitution?' What do they relate to? I conceive this to be very ambiguous. If my interpretation be right, the word '*arising*' will be carried so far, that it will be made use of to and extend the judicial jurisdiction."

In North Carolina, Mr. Davie, 3 Elliot's Deb., 141, says: "It appears to me that the judiciary ought to be competent to the decision of any question arising out of the Constitution itself. On a review of the principles of all free governments, it seems to me also necessary that the judicial power should be co-extensive with the legislative." He then proceeds to discuss the questions which

would arise on the Constitution and laws, with ability and clear insight.

At page 125, Mr. Spencer objects to "the jurisdiction of cases arising under the Constitution; when we reflect on the very extensive objects of the plan of government, the manner in which they may arise, and the multiplicity of laws that may be made with respect to them, the objection against it will appear well founded." He then enumerates subjects of legislation which would bring all contracts and many other cases into the federal courts, and says, "these cases will be so many, that the consequences would be dreadful."

As Chief Justice Marshall declares, none of those who defended the Constitution denied this amplitude of construction, but they admitted it, and in truth defended it, as necessary and proper.

We have, then, the plain words of the Constitution, the history of its enactment and adoption, and the judicial construction of its cotemporaries and expounders, to justify the conclusion that "the Constitution of the United States does authorize Congress to confer such a jurisdiction on this court."

That it is so, is a matter in which this court has had no agency but to use the noble words of one of your predecessors. "It is most true that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. In doing this on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one.

J. B. HEISKELL,
For Appellants.

20-391

No. 106.

Supreme Court of the United States

DECEMBER TERM, 1872.

Thomas Murdock, et. al. Appellants,

vs.

The Mayor and Aldermen of the City of Memphis.

D. K. McREA.

No. 106.

Supreme Court of the United States

DECEMBER TERM, 1872.

Thomas Murdock, et. al. Appellants,
vs.
The Mayor and Aldermen of the City of Memphis.

I.

Is the Act of 1789 repealed by that of 1867, known as the Amendatory Judiciary act.

1. Notwithstanding that the repeal of statutes by implication is not favored, they are so repealed as effectually as by express enactment; when this intent of the Legislature is apparent.

2. A statute which revises the subject matter of a former statute works a repeal.

22, Wise, 234.
2, W. Va., 416.

3. And this it will do though it be not repugnant if the intent appear to prescribe the only rule in the case provided for.

40, Miss., 268.
15, Cal., 294.
19, Cal., 501.

4. If a subsequent statute revising the subject matter of a former one appear to be intended as a substitute, it will operate a repeal by implication.

21, Texas, 734.
30, Vt., 344.
31, Vt., 607.
37, N. H., 295.

5. In so far as a subsequent statute is a literal transcript of a former one it is a substitution, for it is not the intention of the Legislature to cumber the statute books with duplicates of the same subject matter.

6. If there be material additions inconsistent with the former, or repugnant to its provisions, the additions stand, and that which is identical with the former is substituted for it.

7. If the latter statute on the same subject matter omits provisions of the former, the parts omitted are annulled.

42, Maine, 53.
6, Wall, 502.

Applying these rules to the act of 1867, and the intent of the Legislature is apparent.

It is a revisal of the subject matter of the act of 1789, for the most part in the same or closely similar phraseology.

But, besides this, the additions are important, being a material enlargement of the provisions of the statute revised.

*It is not now that the "construction of any clause of the constitution, or of a treaty or statute of or commission held under the United States is drawn in question," that gives jurisdiction,
But,

When any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of, or commission held, *or authority exercised under* the United States, the jurisdiction is given.

This provision embraces the entire scope of the original act in this particular, and materially enlarges it, revising the former act and substituting this, and prescribing this latter as the rule in the case provided for.

There is also an essential omission annulling a distinguishing characteristic of the former act, and establishing a new rule wholly inconsistent with the former in two particulars.

1. Errors may be assigned or regarded as a ground for revisal other than such as appears on the face of the record, and immediately respect the questions of validity, &c., because the restriction is removed.

2. The proceeding upon revisal is essentially changed.

Here then is an act amendatory of a former, revising its provisions, enlarging some and annulling others, prescribing a new rule and furnishing a complete substitute.

If repeal by implication will hold in any case it would seem to be one fraught with all these evidences of a new intent on the part of the Legislature.

This Court may also look for the intent of Congress to the cotemporaneous legislation; as the several acts for the removal of causes from the State Courts to the National tribunals.

See Acts, 1863, 1866, 1867.

All these have their origin in the apprehension of an obstruction of the regular administration of justice from local and State attachments, prejudices, jealousies and interests. The idea of the National Legislature evidently being that the appellate power of the Supreme Judicial Court of the nation, constituted by the people of the United States themselves, cannot be detrimental, but must be beneficial in fulfilling effectually the beneficent ends of the constitution.

More than this, it cannot escape the judicial mind that the purpose of Congress was to bring more nearly to the mind of the people of the whole nation, unobscured by interposing elements, that the "Constitution of the United States and the laws of Congress, passed in pursuance thereof, are the supreme law of the land," to be placed more surely under the protection of the Judicial power, to be more uniformly and correctly expounded, and more conveniently and effectually enforced.

In order to do this, Congress, by this amendatory act has enlarged the jurisdiction appellate of the Supreme Court. Has removed the restrictions upon its perfect exercise, and vested it with a discretion in the enforcement of its decisions at once new and potential. All these evidences of the intention of Congress are to be found in this act, under discussion, and its kindred measures; and signify the purpose to substitute this for a rule that was not deemed efficacious.

II.

If the act of 1789 be repealed, does the act of 1867 authorize the Supreme Court of the United States to review all questions in the record, or is the jurisdiction confined to the federal questions?

In so far as the purpose of Congress and the meaning of the act is concerned, there can scarce be a doubt.

The language of the act, taken literally, declares that the "judgment or decree may be re-examined and revised, or affirmed in the Supreme Court of the United States, upon a writ of error, (and in proper cases upon an appeal) *in the same manner and the same regulations* as if it had been passed in a court of the United States."

And the "*writ* shall have the same effect as if the judgment or decree" had so passed.

In order rightly to ascertain the force of this provision on the point now debated, we must not lose sight of the matter omitted.

What is the restriction expressly interposed in the statute revised?

That restriction was placed in the former act for an object? It was so placed because it was considered necessary to that object. Not "*ex abun danti cautela*," but for the reason that without such express restriction there could be no such implication from the previous clause of the enactment; but the plain and manifest interpretation would defeat the object.

Hence, in the former act the prohibition was inserted in positive terms.

Now in the revising act it is wholly omitted and *annulled*, and the conclusion is inevitable that the object no longer exists.

But it not only had an object, but a meaning. It is a restriction of the jurisdiction of the court—within defined and located lines—in language positively mandatory, and by force of it has this court almost universally declared itself restrained to the record and to the questions which were allowed to be presented.

As early as the case of Durousseau vs. The United States, C. J. Marshall used this language: "Had the judicial act created the Supreme Court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the Constitution assigned to it." * * "And in omitting to exercise the right of excepting from its constitutional powers, would have neces-

sarily left those powers undiminished. The appellate powers of this court are not given by the judicial act;—they are given by the Constitution. But they are limited and regulated by the judicial act."

6 Cranch, (314.)

And in Galston vs. Hoyt, Justice Story puts the want of power to examine other than the federal question, that "the act of Congress has *expressly precluded* us from a consideration of such a question."

3 Wheaton, (326.)

It is evident that in the former case, C. J. Marshall had reference to the express limitation contained in the last clause of the 25th section of the act of 1789.

For in Osborne vs. The Bank, he holds as the opinion of the court, that under the constitution extending the "judicial power to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority." That the judicial department receives jurisdiction to the full extent of the constitution, laws, &c." And this, although several questions may arise in it, which depend on the general principles of law, not on any act of Congress, and that it is the duty of the court to examine the whole case and all questions arising in it, or otherwise "a clause in the constitution relating to a subject of vital importance, and expressed in the most comprehensive terms, would be construed to mean almost nothing.

9th Wheaton, (819, 820.)

It is true this case was upon a writ of error to the circuit court of the U. S. But the question was upon the extent of the judicial power *under the constitution.* And as it is there confined, as it is in the act of Congress both original and appellate to cases arising under the constitution, the laws, &c. And as under the 25th section of the act of 1789, the judgment of the Supreme Court was to be in the same manner and under the same regulations, and the writ to have the same effect as if the judgment had been rendered in a circuit court; the limitation he spoke of must have been that contained in the close of that section. And the "express preclusion" of Judge Story must here be found, for such preclusion is no where else *expressed* in the act.

The two acts construed together, enforce the conclusion that the

intent of the amendatory act is to open all questions to re-examination when the jurisdiction is once received. For the limitation in the first act was deemed essential, in order to introduce the restriction, and it is a necessary inference that when Congress by omitting, annulled the limitation it had in view to remove the restriction, not doubting but that it had the power to do so, and by this means it accomplished it.

The phraseology of the acts leads to this construction.

It is not that the judgment or decree may be examined, but *re-examined*, and there can be no re-examination of a matter that has not been theretofore examined; and this right to re examine, that is to examine over again the judgment or decree, would have involved as full and complete an examination as had before been given, if it were not that this re-examination was confined and made partial by the limitation imposed.

Again there is much force to aid this construction in the authority given to this court by the act of 1867, in its discretion "to proceed to final decision and award execution, or remand the same (that is the cause) *to an inferior court.*" By "inferior court," is here meant either the "Highest Court of the State" from which the appeal had come or to which the writ of error had been directed, and thus by act of Congress, to designate that, as in relation to such case—an inferior and subordinate tribunal, subject to the mandate of the appellate court, and so set at rest any remaining impression to the contrary, and thus clearly impress this court with the full and adequate capacity and authority to re-examine the judgment and decree.

Or the power is here given to pass by the "Highest Court of the State," and remand the cause in the same manner and under the same regulation, with the same effect in the writ as if the judgment had been rendered in a court of the United States to that inferior court where it originated.

If this latter be the true meaning—which is the most likely—it necessitates the conclusion that this court, as of last resort, must have passed upon the whole case.

Suppose in a case where, besides a decision against a title claimed under an act of Congress, there were general principles involved, which were also decided, and upon a writ of error the case should

go to the "Highest Court of the State," and the judgment be affirmed, but a writ of error, operating as a supersedeas, should then be taken from this court, no mandate would go down from the appellate State court to the inferior court. If, then, this court, examining only the federal question, should remand the cause for a venire de novo, how could the inferior court be put in possession of the decision of the appellate court of the State, and its mandate upon those general questions which this court has left unnoticed.

The conclusion is irresistible, that Congress, by allowing to this court this power, had in contemplation that it should dispose of the whole case.

Finally, upon this point: The *writ* in which are the assignments of error, cannot have the same effect as if the judgment or decree had been rendered or passed in a court of the United States, unless all the errors were passed upon, and as there is no longer any prohibition of errors that may be assigned or regarded, but the express prohibition heretofore existing is annulled, it follows that this statute must have effect according to its language, and it must be considered that the Legislature, in removing the express qualification, leaving the antecedent unqualified, intended to commit it to its literal interpretation.

III.

The remaining question is:

Is such a power to go at large into all the questions in a case consistent with the Constitution of the United States?

In near two hundred and fifty cases in this court, has the constitutionality of the act of 1789, in its 25th section, been affirmed and recognized. And with scarce an exception, from a period cotemporaneous with its passage, down to the present time, have the State courts sanctioned and acknowledged its constitutionality and yielded the obedience which its provisions exacted.

In no case that I have ever seen, has the question of its constitutionality turned upon the restricting clause which I have been discussing. No intimation that I have found, has been given that this clause was needed to insure its constitutionality, and no decission has given such importance to this clause. Like every other portion of the act, this clause has been considered as "in pursu-

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In no case that I have ever seen, has the question of its constitutionality turned upon the restricting clause which I have been discussing. No intimation that I have found, has been given that this clause was needed to insure its constitutionality, and no decision has given such importance to this clause. Like every other portion of the act, this clause has been considered as "in pursu-

ance of the Constitution"—as being of those "exceptions and regulations" which Congress might make, and nothing more.

In the leading case of Martin vs. Hunter, lessee, where the whole subject was discussed and exhausted, no prominence whatever was given to this clause. On the contrary, much was said which excludes the supposition that in any degree does this law, as being "in pursuance of the constitution," rest upon the restriction of the assignment of errors, &c."

For example, this appellate jurisdiction by writ of error to the State court is assimilated to the power of removal of causes from the State to the inferior National courts. Which latter power is said not to be given to the constitution by express terms, but only by implication, and is denominated an appellate jurisdiction, and may be exercised as well after as before judgment but for the 7th amendment, as Congress might have given the writ of error from this court to interlocutory as well as final judgment.

Now, when it is remembered that by the removal from a State to a Federal court, the case ceases in the former and proceeds in the latter as if it had begun there, and the power of removal is derived to Congress from the constitution by implication, and the causes of removal are often because of the same subject matter, as affords the appellate jurisdiction to this court over decisions of the "Highest Courts of the State," it is not difficult to see how the express language of the constitution no more confines the investigation than it is confined in the cases of the removal of causes from the State to the inferior Federal court.

If one exercising authority under the United States, being sued in the State court, should remove his cause to a circuit court by an act of Congress, not restricting the enquiry, it would proceed in that court as though it had originated there, and all the questions would be tried, and a writ of error from this court would bring up the whole case for re-examination. The constitutional power of Congress to this end is established, though derived by implication.

Now, if the same case were continued through the State courts and brought here upon error, in absence of any regulation by Congress to the contrary, why is not the whole case open to re-examination upon the *express* provision of the constitution.

So again, if Congress as in cases of "admiralty and maritime," may give the exclusive jurisdiction to the courts of the United States, and the whole case to the appellate jurisdiction of the Supreme Court, how can it be limited by the same words in the same clause of the constitution, when it comes to supply the same appellate jurisdiction to the same court over the State courts standing in the same relation of inferiority.

Instead of merely "calling to the aid of the Federal judiciary the State tribunals by leaving them concurrent jurisdiction in which Federal questions might be involved, with the right of appeal to the Supreme Court;"

The Justices vs. Murray, 6 Wall., 280.

Congress might have given to the Federal judiciary in its distribution of the judicial powers *exclusive jurisdiction* in all cases as to which the appellate power of the Supreme Court is enumerated, just as it has done in those "of admiralty and maritime jurisdiction."

If instead of doing so, it had allowed the concurrent jurisdiction of the State courts, with right of appeal in the same manner as though from a judgment in a court of the United States, it would seem to be manifest in the absence of a restricting regulation, that this appellate power is intended to operate a re-examination of the whole case, and would be constitutional. The reasoning of Mr. Justice Nelson, in the case of The Justices vs. Murray, confirms this view.

In a late case one of the present Justices of the Supreme Court, says: "Two things are necessary to give jurisdiction whether original or appellate. The constitution must have given the court capacity to take it, and an act of Congress must have supplied it. To the extent that the action of Congress is not taken, the power lies dormant, jurisdiction *alike comprehensive* in either case may be given. The constitutional boundaries of both are the same. Every variety and form of appellate jurisdiction within the sphere of the power extending, as well to the courts of the State, as to those of the Nation is permitted, nor is it any objection that questions are involved which are not all of a Federal character.

6 Wall., 252.

This is in strict concurrence with the views of the court in Du-

seaurreau's case. And if it be true that the constitutional boundaries of both the original and appellate jurisdiction are the same, and that so far as the latter is concerned, it extends as well to the courts of the State as those of the Nation, there being no objection that questions are involved which are not all of a Federal character, we have two results:

1. That the appellate jurisdiction of this court on a removal from a State court after judgment, extends to the same length as that of the circuit court on a removal to that.

2. That the judgment or decree of the State court is affected by the reversal here, and the re-examination is conducted here in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree had been rendered or passed in a court of the United States.

If this be so, we have only to look to the opinion of the court in the case of Osborne vs. The Bank, to see the extent of the jurisdiction in a court of the United States, under the Constitution.

That case decides that original jurisdiction, so far as the Constitution gives a rule, is co-extensive with the judicial power, and there is no prohibition to its exercise in every case in which the the judicial power may be exercised. That in all cases where the appellate power of the Supreme Court exists, the power can be exercised in its original form by courts of original jurisdiction, as well those of the nation as of the States, and this includes alike those cases which depend on the character of the cause or the nature of the parties.

And this original jurisdiction may be exercised under the Constitution in all cases arising under the Constitution, laws and treaties, notwithstanding that the case involves questions incidental depending on general principles or even unconnected with the federal questions, and that in such cases this jurisdiction extends to the whole cause, and not to those parts of causes only which present the particular question involving the construction of the Constitution or the law.

It is to be remembered also, that this original jurisdiction may, by Congress, be made exclusive in the federal court.

Now the appellate jurisdiction, under the Constitution, of this court is precisely the same over the inferior federal courts, and

courts of the State. It extends to the same cases and controversies in the same form and to the same limit. And in the absence of any exception or regulation by Congress, there is no distinction between the two. Both are after final judgment; both upon writ of error; both are for re-examination, and both are followed by a controlling mandate.

It follows, then, that what would be insufficient to withdraw the appellate jurisdiction of this court of a case originally decided in a court of the United States, will be insufficient to withdraw that jurisdiction of a case originally decided in a State court by its concurrent jurisdiction.

Is there any exception, then, or regulation, then, in the act of 1867, which distinguishes the appellate jurisdiction of this court of a case originated in a court of the United States, from that of a case originated in a State court where both depended on the character of the cause? There is none, unless it be found in that limitation that the decision must be against the validity of the statute of the United States, or in favor of the statute of the State, or against the title in the third clause.

Opposed to the idea that this distinction varies the appellate jurisdiction in the two cases, are the express declarations:

That the re-examination and reversal or affirmance is in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree had been rendered or passed in a court of the United States. And the cause may be remanded to the inferior court where it originated.

There is one more matter that to my mind adds great force upon the question of constitutionality.

It is the understanding of Congress in like cases.

By the act of 1815, 3 March, jurisdiction is given to the State courts of actions for direct taxes, internal duties, &c., and sec. 2d provides that "final decrees and judgments in civil actions passed or rendered in any State court by virtues hereof, may be re-examined in the circuit court of the United States, in the same manner and under the same regulations as are prescribed by sec. 22 of the judicary act of 1789." By recurring to that section, it will be seen that the appellate jurisdiction of the circuit court therein created, involves an assignment and regard of errors generally, and a re-

examination of the whole case, which as may readily be seen may involve questions other than strictly federal.

The constitutionality of this act has not been questioned.

Much might be said upon the manifest feeling which animated Congress. It is but in harmony with the public sentiment of the nation. The centrifugal tendencies rather than those which are centripetal have developed the perils and evils which have befallen the government and people. Something is needed to put the rights derived from the supreme law of the land more effectually under the protection of the nation; that the hazards of local and State contradictions may be avoided, and uniformity in its construction may be attained. This purpose is seen in the whole legislation of late years, and the material alterations of this famous section of the judiciary act is only a portion of the developement of that purpose. The same constitutional power which enabled Congress to create the exceptions and regulations in 1789, justifies the change of them in 1867.

D. K. McRAE.

20-390

IN THE

Supreme Court of the United States

THOMAS MURDOCK, et al, Plaintiffs in Error -

vs.

The Mayor and Aldermen of the City of Memphis.

BRIEF OF

ESTES & JACKSON

FOR THE DEFENDANTS.

UPON RE-ARGUMENT.

H. Wade & Co., Printers.

Supreme Court of the United States

THOMAS MURDOCK, et al, Plantiffs in Error

vs.

The Mayor and Aldermen of the City of Memphis.

BRIEF OF

ESTES & JACKSON

FOR THE DEFENDANTS.

UPON RE-ARGUMENT.

The first proposition for re-argument is:

1st. "Does the second Section of the Act of February 5th, 1867, repeal all or any part of the 25th Section of the Act of 1789, commonly called the Judiciary Act?"

In answer to this proposition, we submit, that upon the authorities, the first named Section "virtually repeals" *only such parts* of the 25th Section of the Judiciary Act as are positively repugnant to its provisions, or such parts of it, as are *covered by its terms* in such a manner as plainly show that they were intended as a substitute for the first Act.

United States vs. Tynen, 11 Wall. 88, and authorities cited.

Sedgw. on Stat. and Cons. Law, p. 126.

Repeals by implication are not favored, and the Courts are bound to uphold the prior law, if the two Acts may

well subsist together, and to give effect to both *if possible.*

Sedgw. on Stat. and Cons. Law, p. 127.
5 Hill, 221, 4 Gill, and John 1.
McCool vs. Smith, 1 Black, 459.
11 Wall. 92, 10 Barr. 442.
21 Penn. 37, 6 Cush, 465.

The question of the effect of the second Section of the Act of 1867 upon the 25th Section of the Judiciary Act is expressly left undetermined by the Court, in Stewart vs. Kahn, 11 Wall. 503. The *whole subject matter* of the 25th Section of the Judiciary Act is not covered by the second Section of the Act of Feb. 5th, 1867, and to the extent not covered thereby, the old Act is in force.

Norris vs. Crocker, 13 How. 429.
Wood vs. United States, 16 Peters, 342.

Conceding for the argument, that the second Section of the Act of 1867 covers the whole subject matter of the twenty-fifth Section of the Judiciary Act *upon every other point*, we insist that the "subject matter" of the *last clause* of said Section of the Judiciary Act is not covered or affected thereby, and that this clause is yet in force. There is nothing in the second Section of the Act of 1867 repugnant to this last clause of the 25th Section, and the subject matter thereof is in no wise covered by said second Section. "*It is* possible;" yea, we submit it is *fit and proper* to reconcile the two together and give effect to both.

The title of the Act of February 1867, may be referred to, to furnish some aid in showing what was the mind of the Congress.

United States vs. Palmer, 3d Wheat. 610.
Hadden vs. Collector, 5th Wall. 107.

The title of the Act is, "An act to *amend* an Act to "establish the judicial courts of the United States."

The intention of Congress was then to "*amend*," not to "*repeal*," and we submit, that at the most, the effect of the second Section of that Act was to strike out all of the twenty-fifth Section of the Act of 1789, except the last clause, and to insert that section in its stead. This construction is in consonance with the rules and principles laid down in the authorities cited, and is favored by the

argument that it is not to be supposed that Congress intended (at least without express language to that effect) to abrogate a salutary provision which had been in force and well understood for three quarters of a century, and which at least was supposed to be a part of a judicial *system* which had the Constitution for its chief corner-stone.

But the language of Mr. Justice Swayne, in delivering the opinion of this honorable Court in Stewart vs. Kahn, will be relied upon by counsel on the other side. On page 502, 11 Wall, the Court say: "It is a rule "of law, that when a revising statute, or one enacted "for another, omits provisions contained in the original "Act, the parts omitted cannot be kept in force by con- "struction, but are annulled," This was not the point for decision in that case, and the Court expressly leave undecided the question, whether the second Section of the Act of 1867 was strictly a "revising statute," or "one "enacted for another," so as to supersede the other Act. If the Court had decided that the "one statute *was* en- "acted for the other," it would have been an adjudication that the one act "superseded the other." The question under discussion *now* is, whether the last Act *is* a "revising statute" or "one enacted for another," within the meaning of the authorities. The cases cited by the Court to sustain the proposition show that it was not intended to oppose our view of this case. They are:

Ellis vs. Paige, 1 Pick., 43.
Nichols vs, Squire, 5 Ib., 168.
Bartlett vs. King, 12 Mass., 537.

In the 5 Pick. case, it was held that the statute of 1817 repealed the Act of 1785, because it "appears to "cover the whole subject matter of the statute of 1785;" and "when the Legislature impose a second penalty for "an offense, whether smaller or larger than the former "one, a party cannot be allowed to sue on one or the "other at his option. This point of a repeal by implica- "tion is supported by authority," etc. Thus, upon the ground that the second statute was a revising statute, and covered the whole subject matter of the first, the latter was held to be repealed.

The 12 Mass. case holds the same doctrine. The Court says: "A subsequent statute, revising *the whole subject*

"matter of a former one, and evidently intended as a "substitute for it, although it contains no express words "to that effect, must, on the principles of law as well as "in reason and common sense, operate to repeal the "former," etc.

The question in the first Pickering case was, whether, under the Act of 1783, all parol leases were leases at will, and it was argued that an analogous English statute had been construed in a certain way; and that this authority was controlling. The Court decided that the English statute contained an exception; that it had been adopted in Massachusetts, and because the Act of 1783 omitted the exception, the result was that the exception was annulled. Why! Because *that very subject matter*, was revised and covered by the Legislation which enacted, that "all parol leases, &c.," instead of "all parol leases *except* parol leases, not exceeding the term of three years, &c., shall have the force and effect of leases or estate at will only, &c." The last act therefore, covered the whole subject matter of the first act, and when it said "*all parol* leases," it certainly did not intend any exceptions.

In the statutes under consideration, the subject matter not covered by the amendment, is a matter distinct from the other subjects of the old Act, and is not covered by the new. The portions of the Act revised, are those which define and confer the appellate jurisdiction; the last clause (which is not revised,) is a limitation upon the Court *after* the jurisdiction is acquired, and is *declaratory*, as we submit, of the constitutional limitation.

Mr. Abbott, in his work on United States Court Practice, vol. 1, p. 333, after stating the test of the question of jurisdiction under the 25 Sec. of the Judiciary Act, says: "And this principle appears applicable un- "der the Act of 1867, though it does not contain the "declaratory clause of Sec. 25." And on same page, with the Act of 1867, before him, he says: "The ap- "pellate jurisdiction of the Supreme Court does not "include authority to re-examine the whole case."

When the authorities upon the question of implied repeals of statutes are carefully considered, does not the principle stated by Judge Story in Wood vs. United

States 16 Peters, 362 and 3, control them all? Upon the point of repeals by implication, he says, "For it is "not sufficient to establish that subsequent laws *cover* "some *or even all* of the cases provided for by it, for "they may be merely affirmative, or cumulative, or "auxiliary. But there must be a positive repugnancy "between the provisions of the new law and those of the "old, *and even then* the old law is repealed by implica- "tion only, *pro tanto, to the extent of the repugnancy.*" It is believed that the element of *repugnancy* pervades all the cases, which decide that a revising statute which omits some parts of the old statutes, operates as a repeal of the parts omitted, and that these cases are in accord with the doctrine stated by Judge Story in 16 Peters.

Thus in Ellis vs. Paige, 1 Pick., 45, the revising statute covered "all leases," which was positively repugnant to the clause omitted from the old statute, for that made *an exception.*

The case of Nichols vs. Squire, 5 Pick., 168, simply holds, that when a statute imposes a *new* penalty for an offense, it repeals, by implication, so much of a former statute as established *a different penalty.* Why? Certainly, because there is a repugnancy between the two statutes and they cannot stand together.

In Bartlett vs. King, 12 Mass., 545, where the Court states the doctrine of the effect of an omission in a revising statute—and in the same sentence—the case of King vs. Cater (4 Burr) is used to illustrate the doctrine, and that was a case of a new and different penalty substituted for an old one. It would be difficult to imagine a case in which a new statute covered the *whole subject matter* of an old one, without merely re-enacting the old statute or making provisions substantially repugnant to those of the old one. Therefore, there is but little substantial difference between the principle that a revising statute which covers the whole subject matter of an old statute operates as a repeal, and the doctrine that a new statute which is substantially repugnant to an old one operates as a repeal. The revising statute under the authorities, repeals, to the extent that it *covers* the *subject matter* of the old, which is equivalent to the doctrine that a new statute repeals

to the extent that *it is repugnant to an old one;* so in United States vs. Tynen, 11 Wall. 92, it was held that there was a clear repugnancey between the Acts—so in Norris vs. Croker, 13 How. 429. Therefore, it is submitted that there is nothing in the 2d Sec. of the Act of 1867, which covers, or is repugnant to this last declaratory clause of the 25th Sec., and that for this reason it is not repealed.

The case of White vs. Johnson, 1 Cush., 23 Miss. Rep., 68, is an authority in point to sustain our views. The question was, whether the Act of 1844, "*amenda-*" *tory* of the Acts of limitations," and which did not contain the usual saving clause in favor of persons under disabilities, repealed by implication the saving clause in the former Act. The Court held, that, although the last Act repealed "all Acts and parts of Acts in conflict "with and contrary to its provisions," yet it only professes to be an *amendment* of the former Act, and does not purport to introduce an *entirely new series* of *enactments* and to be a *perfect and complete system within itself* For these reasons, and because there was no positive repugnancy between the two Acts upon this point, the Court decided that the saving clause of the old Act was not repealed.

See, also, Richardson vs. Patterson, 30 Miss., 583.

Evidently, therefore, the intention and effect of the second Section of the Act of February, 1867, was to enlarge somewhat the provisions of the 25th Section of the Judiciary Act and to superadd thereto the last paragraph of the Section, as follows: "This act shall not "apply to the case of any person who is or may be held "in the custody of the military authorities of the United "States charged with any military offense, or with hav-"ing aided or abetted rebellion against the Government "of the United States prior to the passage of this Act."

If this construction is not adopted, the conclusion is inevitable, that the main object of Congress in passing the second Section of the Act of 1867 was to annul the last clause of 25th Section of the Judiciary Act, and *that it adopted a most singular means of accomplishing that end.*

The repugnancy between the two Sections, which learned counsel contend for in their argument, is not

real. If the clause with the exception and the clause without the exception cannot stand together, then the clause *with the exception*, as it stood in the 25th Section of the Judicary Act, *was repugnant in itself*, and that Section was composed of inconsistent and irreconcilable provisions. This construction cannot be entertained. We submit, that the clause of the statute which provides, "May be re-examined and revised or affirmed in "the Supreme Court of the United States upon *a writ* "*of error*, the citation being signed by the Chief Jus- "tice, or Judge, or Chancellor of the Court rendering or "passing the judgment or decree complained of, or by "a Justice of the Supreme Court of the United States, "in the same manner and under the same regulations, "and the writ shall have the same effect as if the judg- "ment or decree complained of had been rendered "or passed in the Circuit Court, and the proceeding upon "the reversal shall also be the same, except that the Su- "preme Court may, at their discretion, proceed to a final "decision of the same and award execution or remand the "same to an inferior Court," contemplates and embraces *only the mode of signing and issuing the citation*, the manner and regulations connected with the issuance and service of the citation, the *effect* of the writ of error upon the judgment of the Inferior Court, and upon the removal of the case into the Supreme Court, and the mode of "proceeding" when the judgment or decree is reversed. It refers to matters of *proceeding* and *practice*, and not to questions of judgment or jurisdiction. It does not intend to prescribe "what shall be assigned or regarded as a ground of reversal," but refers exclusively to matters of "*practice* and *proceedings*," and hence, is not in any sense, repugnant to the clause which *does* prescribe what shall, and what shall not "be assigned or regarded as ground of reversal." Great significance is attached by counsel to the language, "*the writ shall have the same effect, etc.*" This refers to the effect of the writ upon the judgment of the Inferior Court, and upon the removal of the case, as is evident from the context. The paragraph immediately preceeding it, provides who shall sign the citation, and the "manner and regulations" of signing, issuing and serving it, and the next succeeding paragraph refers to the "*pro-*

ceeding" upon the reversal, hence, upon familiar rules of construction, "the *effect of the writ*" must be held to refer to matters of the same character and not to *matters of judgment*, when the cause is removed. *Noscitur a sociis.*

Another consideration is this: The Constitution provides that "in all the other cases before mentioned, the "Supreme Court shall have appellate jurisdiction, both "as to law and fact, *with such exceptions* and under "such regulations as the Congress shall make." The last clause of the 25th Section of the Judiciary Act is not "*an exception*" within the meaning of the clause of the Constitution. In Durousseau vs. United States, 6 Chanch., 318, the Court say: "It is to be recollected "that the appellate powers of the Supreme Court are "defined in the Constitution, subject to such exceptions "as Congress may make. *Congress has not expressly* "*made any exceptions*," etc. Instead of "an exception" to the judicial power, it was an express and clear statement of the limitation which the Constitution and *the body* of the 25th Section imposed upon the judicial power. Therefore this was not an "exception" contemplated by the Constitution, which the Act of 1867 intended to annul.

2d. For the reasons already urged, we answer the second proposition for re-argument, that "*it is not* the "true intent and meaning of the Act of 1867, above re-"ferred to; that when this Court has jurisdiction of a "case, by reason of any of the questions therein men-"tioned, it shall proceed to decide all the questions pre-"sented, which are necessary to a final judgment or de-"cree."

Independent of the constitutional limitation, it is insisted that the last clause of the 25th Section of the Judiciary Act is in force and precludes the Court from the authority to re-examine the whole case. This point is fully settled in the case of Montgomery vs. Hernandez, 12 Wheat, 130; and this has been the recognized doctrine of this Court ever since. It certainly should be a cogent and insuperable consideration that would induce the Court to decide, that under the provisions of our Constitution and the economy of our Government, Congress intended by this Act to destroy the old land-

marks of jurisdiction and to confer upon the Federal Government the powers and jurisdiction which have always been conceded to the States, and which they have exercised without let or hindrance.

The question whether the restrictive language of the *body* of the second Section of the Act of 1867, *independent* of the language of the last clause of the 25th Section of the Judiciary Act, would not of itself limit the Court to the decision of Federal question in the case, is worthy of consideration.

3d. The third proposition for re-argument is: "If "this (the foregoing) question be answered affirmatively, "does the Constitution of the United States authorize "Congress to confer such jurisdiction on this Court?"

We answer that we think not. While the second Section of Article 3 of the Constitution confers and prescribes the judicial powers, it is also a *limitation upon it;* and that power does not extend beyond the cases expressed therein, or such as are incident thereto.

It seems to be well settled that the exercise of the judicial powers of the Government are not to be extended to other subjects than those which are found to fall within the purview of the Constitution, "and that "no powers have been conferred either upon the judi- "cial or other departments of the Federal Government, "except those specially granted by the Constitution, "either by express words or by necessary implication."

1 Abbott, United States Court Practice, 182.

Ex parte Bollman, 4 Cranch, 82.

But the question is, did the Constitution, by providing that "the judicial powers shall extend to all cases," etc., intend that the *appellate* jurisdiction should embrace every question involved in every case which is brought before the Federal Courts from the State Courts, even though such questions should be distinct from the *casus foederis* and involve only *general principles of law.* This Court has, since the foundation of the Government held, with the last clause of 25th Section of the Judiciary Act in force, that the judicial power only extended to the decision of the Federal questions and such others as are incident thereto and inseparably connected therewith. The Judiciary Act has been considered a cotemporaneous exposition of the

Constitution, and the embodiment of the last clause of the 25th Section in that Act is therefore authority in favor of the limitation upon the appellate jurisdiction.

Cohen's Virginia, 6 Wheat. 420.

Marshall, C. J., in that case, after stating that the opinion of the Federalist has always been considered as of great authority, says: "A contemporaneous exposition of the Constitution, certainly of not less authority "than the Federalist, is the Judiciary Act itself. We "know that in the Congress that passed that Act, were "many eminent members of the Convention which "formed the Constitution," etc.

Cooley on Con. Lim., 67; 1 Cranch, 299.

In the case of Osborne vs. U. S. Bank, 9 Wheat, 816, etc., it was settled that the Federal Courts, in exercising *original* jurisdiction, are not confined to the decision of the Federal questions involved; but may decide other questions depending on general principles as incidental to those which give the jurisdiction. The question of *appellate* jurisdiction was not before the Court and is not decided.

Original jurisdiction of a case necessarily involves *original* jurisdiction *of the whole case*, while *appellate* jurisdiction, to be exercised through the instrumentality of a writ of error, involves only questions of law, and is confined to the errors assigned. Hence, upon principle, while *original* jurisdiction covers *the whole case*, *appellate* jurisdiction does not. The reasons upon which the decision of Osborne vs. U. S. Bank was based, were conclusive, as applicable to the question (before the Court) of *original* jurisdiction; for if, because other questions than the construction of the Constitution or laws of the United States were involved in a case; the inferior Federal Courts could not take jurisdiction, the result would practically defeat the *original* jurisdiction of these Courts. But this reasoning does not apply to the jurisdiction under consideration, as is apparent from the experience of the Government under the operation of the last clause of the 25th Section of the Judiciary Act since 1789. It has been found by *that experience*, that the appellate jurisdiction of this Court *can* be exercised over cases coming from State Courts, without "extending to the whole case," and without

practically defeating the judicial power of the Government. Hence, the reasons upon which the decision in Osborne vs. United States Bank is based, in respect of *original* jurisdiction, have no force when applied to the *appellate* jurisdiction over decisions of State Courts. But it may be asked, how can the same clause of the Constitution be so construed as to authorize Congress to confer *original* jurisdiction over the *whole case*, and at the same time to preclude Congress from conferring *appellate* jurisdiction in some instances over the whole case? The answer is, that the Constitution simply uses the language, "extend to all cases," etc., and does not in express terms declare the extent of the authority of the Court *over the case*, and leaves the question one of construction. In reference, therefore, to the *original* jurisdiction, the construction is adopted in Osborne vs. United States Bank, which is absolutely necessary to make the jurisdiction effective and beneficial and to prevent a practical defeat of jurisdiction. The framers of the Constitution intended that the judicial power should be effective and beneficial; therefore, when one construction would accomplish that end and another defeat it, the first is to be adopted. Besides, in reference to *original* jurisdiction under the Constitution, no question of conflict between the Federal and State Governments was involved. All of the original jurisdiction was necessarily conferred upon the Federal Courts in *the first instance*. The construction, therefore, which gives *original* jurisdiction over the whole case does not conflict with the *letter* or the *spirit* of the Constitution; at the same time the construction, which forbids *appellate* jurisdiction over the *whole case* in causes coming from State Courts, does not conflict with the *letter* of the Constitution, and is, as we submit, absolutely necessary to avoid a conflict with *its spirit* and the genius of the complex government which it speaks into being. The State sovereignties existed antecedent to the formation of the Federal Government, and as such, conceded limited and defined powers to the General Government, "in order to form a more perfect union," etc. The Constitution, while defining these conceded powers, recognizes the existence and sovereignty of the States, and reserves to the States respectively the powers not dele-

gated to the United States by the Constitution, nor prohibited by it to them. Hence that instrument recognized "to the States respectively" the powers not delegated, as fully as it established the delegated powers to the the General Government. Therefore, the spirit of the Constitution is as much violated by assuming to the General Government, any of the powers not delegated thereby, as by abridging the Federal powers delegated expressly or by implication. If a State Court should assume to finally decide the Federal question in every case as incident to the other questions involved, which are legitimate subjects of its powers, such power would not be conceded; and yet, we submit that for the Federal Courts in cases like this to exercise the power of revising and reversing the decisions of the State Courts, upon questions *distinct* from the Federal questions, upon the theory that they are incident thereto, would be equally repugnant to the *spirit* of the Constitution. The same reasons which require that the final decision upon all questions of national jurisdiction should be left to the National Courts, will also require that the decision of the State Courts upon other matters involving no question of national authority, should also be final. The observance of this principle is necessary to prevent conflicts of judicial authority botween these Courts.

Mr. Cooley, in a note on page 14 of his work on Cons. Limitations, says, "Before the National Courts can disregard the rulings of the State Courts on questions respecting the validity and operation of contracts deriving their validity and force from State statutes and made payable *within the State*, and where the State decisions are not at all at variance, they must disregard many of their well considered opinions, besides, establishing for themselves a *correctional* power in regard to the decisions of State Courts, neither given by the Constitution nor consistent with the general divisions of powers in the American system."

The motives, which prompted the Framers of the Constitution in granting appellate power over State Tribunals, were mainly to secure uniformity of decision throughout the United States upon the construction of the Constitution, Federal laws, etc., and to guarantee the peace, safety and sovereignty of the nation.

These motives, and all the considerations urged by the Court in Martin vs. Hunter, 1 Wheat 304, and Cohens vs. Virginia, 6 Wheat. 413, in support of the appellate jurisdiction over decisions of State Courts, are referable to the power as limited to the federal questions.

In both of these cases the constitutional power to revise decisions of the State Courts, even upon the Federal questions, was challenged, and the Court sustained the power, upon the theory that it only extended to the Federal questions.

Ch. J. Marshall, for example, in delivering the opinion of the Court in Cohens vs. Virginia, 6 Wheat. 415, says, "We think that in a Government acknowledgedly "supreme *with respect to objects of vital interest* to the "nation, there is nothing inconsistent with sound reason, "nothing incompatible with the nature of the Govern- "ment in making all its departments supreme, so far as "respects these objects."

On pages 421 and 422 he says further: "The American people may certainly give to the national Courts a supervising power over those judgments of the State Courts *which may conflict* with the Constitution, laws and treaties of the United States without converting them into Federal Courts, or converting the National, into a State tribunal."

On page 423, he says, "Let the nature and objects of our Union be considered, let the great fundamental principle upon which the fabric stands, be examined, and we think the result must be, that there is nothing so extravagantly absurd, in giving to the Courts of the nation the power of revising the decisions of local tribunals *on questions which affect the nation* as to require that words which import this power, should be restricted by a forced construction." It is insisted that the very principles and arguments by which the jurisdiction is sustained in these two cases will forbid the Constitutional jurisdiction now contended for. We refer to and present in this case some of the arguments which were urged in those cases, by counsel who were resisting the jurisdiction. We submit that the jurisdiction in question in this case is contrary to the spirit of the Constitution and to the genius of the Government, that it invades the reserved powers and sovereignty of the

States, and impairs the independence of the State Judiciary. No better example of the dangerous consequences of such a construction can be given than the case at bar. For if this Court takes jurisdiction of the case upon the idea that the Act of Congress ceding this property to the city is involved, it must be admitted that that Act plays but a very subordinate part in the case, while grave questions arising out of the contracts and equities of the parties, and involving general principles of law totally distinct from the Federal question are the real, substantial issues of the case.

These contracts were made within the State of Tennessee, to be executed there; these equities are claimed under the principles of her jurisprudence, and they have been decided upon by the tribunals which are created and appointed by her Constitution and laws, and it is now proposed that this Federal tribunal, representing the Federal sovereignty, shall revise, and if it sees fit, reverse and set at naught the final decisions of the State tribunals, which represents its reserved powers and sovereignty.

We submit that such exercise of power by the Federal tribunal would be in violation of the spirit of the Constitution and the genius of the Government, and might lead to collisions between the Federal and State tribunals.

Moreover, if the construction, contended for by adversary counsel, of the language, "shall extend to all "cases," etc., in the third Article of the Constitution, be correct, then the last clause of the 25th Section of the Judiciary Act was in conflict with this clause of the Constitution, and null and void. This has never yet been suggested by Courts or counsel, and if it can be demonstrated that *this must* be the consequence of the construction of this Article of the Constitution, which counsel insist upon, then we may conclude that that construction is fallacious. Counsel insist that the language, "all cases," in the Constitution, does not mean "*questions arising in cases*," *but the whole cases*, and necessarily *all the questions in the cases*. If this be so, Congress had no more power to enact that certain questions in certain cases within the judicial power of the Government should be excluded from that judicial power,

than to enact that the Federal Courts should not exercise jurisdiction in cases arising under a statute or under a treaty of the United States. The judicial power is declared by the Constitution to extend to "all cases," etc., and if "all cases" means *every question in every case*, as contended for, then when Congress declares that the judicial power shall not extend to some questions in certain cases, it violates the Constitution, and the enactment is void. Therefore, the last clause of the 25th Section of the Judiciary Act, which *does limit* the jurisdiction of the Supreme Court to certain questions in certain cases, is repugnant to this Article of the Constitution and is void.

But counsel will attempt to escape this dilemma, by insisting that the last clause of the 25th Section is an "*exception*" to the appellate power established by Congress within the meaning of the Constitution, which ordains that the appellate jurisdiction shall extend to all cases "*with such exceptions*, and under such regulations as the Congress shall make." If this last clause of the 25th Section was an *exception* to the appellate jurisdiction, it was certainly an "*express* exception." But in the language of C. J Marshall, quoted in the argument of counsel from Duroussou et al, vs. United States, 6 Wheat: "When the first Legislature of the Union (re. "ferring to the Congress of 1789, and to the Judiciary, "Act), proceeded to carry the 3d Article of the Consti- "tution into effect, they must be understood as intend- "ing to execute the power they possessed *of making* "*exceptions to the appellate jurisdiction of the Supreme* "*Court. They have not, indeed, made these exceptions* "*on express terms* ***."

This, then, is an adjudication that the last clause of the 25th Section is not an express exception to the appellate jurisdiction of the Supreme Court, and therefore, this means of escape is not open, and the consequence remains, that the construction of Article 3, of the Constitution contended for is erroneous, or that this last clause of Section 25th was unconstitutional.

As already intimated, we think that this last clause was *declaratory* of the constitutional limitation upon the Judicial power and a contemporaneous exposition of the Constitution, and not an "*exception*" to the appellate

power. And this view seems to be sustained by the quotation from C. J. Marshall's opinion—Supra. We also submit that the language "all cases," in the Constitution, is fulfilled when there is a suit actually pending in the Courts, and where one of the questions of National Jurisdiction is involved in it. The question of National Jurisdiction must come before the Courts, and it must come in the shape of a pending *suit* or "case."

B. M. ESTES,
Solicitor for Defendants in Error.

21-290

IN THE SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1872.

THOMAS MURDOCK ET AL.,
Plaintiffs in Error,
vs.
THE MAYOR AND ALDERMEN OF THE City of Memphis *et al.*
} No. 106.

Brief of Defendants in Error.

The court has been pleased to direct that this case be reargued on the following propositions:

1. Does the section of the act of February 5, 1867, repeal all or any part of the twenty-fifth section of the act of 1789, commonly called the Judiciary Act?

2. Is it the true intent and meaning of the act of 1867, above referred to, that when this court has jurisdiction of a case by reason of any of the questions therein mentioned, it shall proceed to decide all the questions presented by the record which are necessary to a final judgment or decree?

3. If this question be answered affirmatively, does the Constitution of the United States authorize Congress to confer such a jurisdiction on this court?

The first proposition is fully and ably argued in the brief of my learned associate, and I shall abstain from dis-

cussing it in the conviction that I can add nothing to the views which he has presented.

The second proposition assumes that, by reason of some of the enumerated questions, the court has jurisdiction of the suit, and the point for discussion is, whether it is the intent and meaning of the act of 1867 that the court shall proceed to decide all the questions presented by the record which are necessary to a final judgment or decree.

The published proceedings of the two houses of Congress show that the bill, which subsequently became a law, was reported by a committee which had been instructed "to inquire and report what legislation was necessary to enable the courts of the United States to enforce the freedom of the wives and children of soldiers of the United States, under the joint resolution of Congress of March 3, 1865, and the liberty of all persons under the operation of the constitutional amendment abolishing slavery." The first section gives to the courts of the United States, and the several judges thereof, within their respective jurisdictions, in addition to the authority already conferred by law, power to grant writs of *habeas corpus* in all cases where any person may be restrained of liberty in violation of the Constitution, or of any treaty or law of the United States. The bill, so far as the point now under discussion is concerned, was not the subject of special comment. The effect of it was declared by the member of the House of Representatives who reported it from the committee, "to enlarge the privilege of the writ of *habeas corpus*." (Congressional Globe, 1st sess. 39th Cong., part 5, p. 4,151.) And in the Senate an inquiry was made "whether the second section was drawn *on the same principle* as the twenty-fifth section of the Judiciary Act of 1789." The reply was, "it is a little broader than the Judiciary Act. It is of a similar character." (*Ib.*, p. 4,229.) No pur-

pose was avowed, nor do I believe that any existed, to empower or require this court, on a writ of error to a State court, to pass upon any question in the record which turns upon the interpretation of a State constitution or statute, when neither is in conflict with the national authority. The intent to vest a general revisory power, which, since the adoption of the Constitution, has never been exerted over the State tribunals, should be expressed in such clear and unmistakable terms that "he who runs may read" them.

It is not expressly given by the second section. The omission of the last clause of the twenty-fifth section, of the act of '89, coupled with the assumed fact that it either limited some power previously conferred, or prescribed the mode of exercising it, is the only ground upon which the enlarged jurisdiction can be asserted. The clause, if divisible, declares: First, that no other error shall be assigned, or regarded as a ground of reversal, than such as appears on the face of the record. Second, that the error, when assigned, shall immediately respect the questions mentioned in the section.

The word "suit" occurs in both sections. It means the prosecution of some demand in a court of justice, and applies to a judicial proceeding, either at law or in equity, in which a party pursues a remedy which the law affords him. (Weston *vs.* the City Council of Charleston, 2 Peters, 440.) The omission of the words "of law or equity" in the act of 1867, is entirely immaterial. An appeal is the only mode by which a cause of an equitable nature or in admiralty can be brought from an inferior court of the United States for revision, and it extends to matters of fact as well as of law; while a "final judgment or decree in any suit" in a State court can only be "reëxamined" here on a writ of error. That writ is of

common law origin, and removes nothing for consideration but the law. The elementary text-writers say that "it lies only for matters of law arising upon the face of the proceeding." (3 Blackstone, 406.) The jurisdiction on the return of the writ would, therefore, necessarily, and without any limiting words, be confined to such matters.

Congress, by the twenty-fifth section, gave a legislative interpretation to the only clauses of the Constitution which can be construed to give this court control over the action of the State courts. The clause was inserted to define that control, not to restrain it within narrower limits than the Constitution had imposed; and this was done to relieve the subject from all controversy, and to allay apprehensions which then widely prevailed as to the judicial branch of the Government.

The judiciary clause was adopted by the convention at Philadelphia with apparent unanimity and without prolonged discussion. It, with other leading features of the Constitution, was vehemently assailed before the public, and in the State conventions, by many of the conspicuous statesmen of that day. One capital objection to the clause regarded the extension of the appellate jurisdiction of this court to "law and fact," and the omission to secure the right of trial by jury in civil cases, especially as the convention had refused to add to the second clause of the second section of the third article the words "and a trial by jury shall be preserved as usual in civil cases." (1 Elliott, 315.) Richard Henry Lee and other members of the convention refused to sign the Constitution, and some of them withdrew from its deliberations. He declared, in a published letter to the governor of Virginia, that "the trial by jury was discountenanced in civil cases by giving the Supreme Court, in appeals, jurisdiction both as

to law and fact," (*Ib.*, 504;) and George Mason wrote that "the judiciary of the United States is so constructed and extended as to absorb and destroy the judiciaries of the several States." (*Ib.*, 475.) Luther Martin, another member, asserted, in his famous letter to the Legislature of Maryland, that "not only was no provision made in civil cases for trial by jury," but that in criminal cases "if the Government was not satisfied with the verdict of the jury, its officer might remove the prosecution to this court, and the verdict here would be of no effect, as the judges of this court have to decide upon the fact as well as the law, the same as in civil cases." (*Ib.*, 381.) Again, "whether any laws, or regulations, or acts of the President or other officers are contrary to and not warranted by the Constitution rests only with the judges who are appointed by Congress to determine." (*Ib.*, 380.) Edmund Randolph, before the convention met in Virginia, expressed his opinion that amendments should be made by way of "limiting and defining the judicial power." (*Ib.*, 491.) In the Virginia convention George Mason said that he was "greatly mistaken if there be any limitation whatever with respect to the nature or jurisdiction of these (the United States) courts," (*Ib.*, vol. 3, p. 521,) and that after limiting the cases in which the federal judiciary could interpose, "he would confine the appellate jurisdiction to matters of law only in common law controversies."—(*Ib.*, 525.) Patrick Henry thought it "to be clear and incontestable" that the judiciary clause "would destroy the trial by jury, and that the verdict of an impartial jury would be reversed by judges unacquainted with the circumstances." (*Ib.*, 540.) "Trial by jury is omitted altogether in civil cases," and he had rather it had been left out altogether "in criminal cases" than have it so vaguely and equivocally

provided for. (*Ib.*, 541.) Governor Randolph exclaimed: "What do we mean by cases arising under the Constitution? What do they relate to? I conceive this to be very ambiguous. If my interpretation be right, the word 'arising' will be carried so far that it will be made use of to aid and extend the federal jurisdiction." (*Ib.*, 572.) In some of the State conventions other objections were raised to the clause, and urged with zeal and commanding ability. There is, however, no necessity for further detailed references to establish the familiar historical fact, that the enemies of the Constitution maintained that it established a consolidated government, and that the judiciary of the States would be overruled and absorbed. The Pinckneys, Marshall, Madison, Hamilton, Jay, and other friends of the Constitution answered the objections and insisted that, by no just rule of construction could such extraordinary and dangerous powers be justly ascribed to it; but none of these great men claimed, by any recorded word that ever fell from his lips or his pen, that the action of the State courts could be revised by the judiciary department, except on questions purely Federal.

On the meeting of the first Congress twelve amendments were proposed, ten of which were ratified by the States, securing among other rights that of trial by jury in cases at common law, and prescribing that no fact tried by a jury should be otherwise examined in a court of the United States than according to the rules of the common law. Before the amendments were adopted by Congress the judiciary bill passed both houses. That master-piece of legislation originated in the Senate, and came from the hands of a committee, one of whom became Chief Justice of the United States. There was associated with him an eminent Justice of this court. Three of them had been members of the Federal conven-

tion. The Senate then sat with closed doors. We have no record of their debates; but, after carefully reading those in the House of Representatives, I hazard nothing in saying that no member maintained that the judicial power of the United States, when exerted over the consummated proceedings of a State court, extended beyond the determination of the Federal questions involved.

The authors of the act of '89 were not of that school which teaches that the most narrow sense should be given to the words conferring power upon this Government or throwing limitations and restraints upon that of the States. It was a cardinal doctrine of the political faith of a very large majority of the First Congress that the national authority, exerted to its fullest limits, was indispensable to the peace and unity of the country. They showed their faith by their works touching the organization of the several departments, and among others of the judiciary. Although there is not a word in the Constitution which gives this court jurisdiction over a State tribunal, *eo nomine*, they asserted its existence, and provided for its exercise on rights or exemptions claimed under the powers conferred, or prohibitions imposed, by the Constitution, laws, treaties of, or commissions held under, the United States; and, by the clause in question, distinctly affirmed that it could not be rightfully extended one hair's breadth further. They also provided for trials of issues in fact by jury not only in the district and circuit courts in all suits, except of equity, admiralty, or maritime jurisdiction, but also in this court in all actions at law against citizens of the United States; and directed that the laws of the several States, except when the Constitution, treaties, or statutes of the United States shall otherwise provide or require, should be regarded as rules of decision in trials of common law in the courts of the United States when they apply. The twenty-fifth section was at

one time denounced as unconstitutional by leading statesmen and by courts, and attempts have been made by State laws to defeat its operation. The jurisdiction under it, however, has been so wisely and beneficently exercised, and has done so much to perpetuate, in its vigor and purity, the Constitution of the country, that it has finally commanded general acquiesence. No serious effort has been made in Congress to alter its essential provisions or impair their efficacy, nor, unless such be the effect of the act of 1867, to give them a broader scope. It may be justly regarded as an extemporaneous and authoritative exposition of the limits of the Federal power in its bearing on the legislative and judicial action of the States. Chief Justice Marshall, in Cohens *vs.* Virginia, 6 Wheaton, 264, remarks: "Congress seems to have intended to give its own construction of this part of the Constitution in the twenty-fifth section of the Judiciary Act, and we perceive no reason to depart from that construction."

The clause should be held as declaratory of a rule of the common law as well as of a constitutional provision. Its absence from the second section cannot, therefore, be claimed as denoting the intention of Congress to extend the jurisdiction beyond its ancient limits. The measured and carefully guarded phraseology of that section negatives that intention. It is, with the exception of the omitted clause and some slight verbal changes, which are without significance, a transcript of the twenty-fifth section of the act of 1789. It presents in a narrow compass and with admirable clearness and precision every question touching the national authority which can by possibility arise in the progress of a cause in the State courts. It was to maintain that authority, confessedly supreme within the limits of the Constitution, and to secure uniformity in the interpretation of that instrument and of the laws and treaties of

the United States, that Congress provided a resort to this, from a State, court. This was the only purpose of the section. General terms, susceptible of a broader meaning, when severed from the context or used in another connection, should be construed with reference to that purpose. This is a familiar rule of construction. A disregard of it will defeat the objects of the law and do violence to its reason, spirit, and intention.

If the decision of the Federal question by the highest State court is correct, the judgment is affirmed. It is difficult to perceive why action should be taken here on any matter in controversy which has no direct necessary bearing upon this material and controlling question. It will never be required in disposing of a suit, unless the court should assume to act upon the questions which turn exclusively upon the interpretation of State constitutions and laws. This court has habitually accepted "as a rule of decision" the adjudications of the State courts on such questions in all cases arising within the respective States. It has held that "a fixed and received construction" of the statutes of a State in its own courts makes a part of the statutes. It adopts the local law of real property as ascertained by the decisions of the State courts, whether those decisions are grounded on the construction of the statutes, or on the unwritten law of the State. When those courts revoke their former decisions, it follows the latest settled adjudications. This doctrine has been maintained in an unbroken series of decisions, commencing with McKeen *vs.* De Lancey's Lessee (5 Cranch, 22,) and was reaffirmed in Leffingwell *vs.* Warren, (2 Black, 599.) It is not to be presumed that Congress, with a full knowledge of the history and traditions of the court, intended to confer jurisdiction over the State tribunals upon any question where their decisions had been there-

tofore regarded as conclusive—a jurisdiction demanded by no public necessity, and which tends to no good results.

The practical construction of the act of 1867 by the court has been in keeping with these views. It has been tacitly assumed that both sections have the same scope and effect. The cases decided since the act took effect are as follows:

In 6th Wallace.

Walker *vs.* Villavaso, 128.
The Victory, 384.
Hamilton County *vs.* Massachusetts, 636.
Mellinger *vs.* Hartupee, 262.
Rector *vs.* Ashley, 148.
Reichert *vs.* Felps, 165.
Silver *vs.* Ladd, 440.

In 7th Wallace.

Twichell *vs.* Commonwealth, 324.
Austin *vs.* Aldermen, 698.
The Banks *vs.* The Mayor, 22.

In 8th Wallace.

Freeman *vs.* Nichol, 56.
Gibson *vs.* Chotean, 317.
Aldrich *vs.* Ætna Co., 495.

In 9th Wallace.

Downham *vs.* Alexandria, 659.
Worthy *vs.* The Commissioners, 613.
Carpenter *vs.* Williams, 786.
National Bank *vs.* Commonwealth, 363.

In 10th Wallace.

Downham *vs.* Alexandria Council, 175.
New Orleans *vs.* Morgan, 260.
Messenger *vs.* Mason, 509.
Railroad Co. *vs.* McClure, 515.
Bethell *vs.* Demaret, 540.

In 11th Wallace.

Parmelee *vs.* Lawrence, 36.
Insurance Co. *vs.* The Treasurer, 204.

In 12th Wallace.

Trebilock *vs.* Wilson, 687.
People *vs.* Central Railroad, 455.

In 13th Wallace.

Dooley *vs.* Smith, 604.
Klinger *vs.* Missouri, 257.
Tennessee Bank *vs.* Citizens' Bank, 432.
People *vs.* Central Railroad, 455.
Knox *vs.* Exchange Bank, 379.

The court, in these cases, confine themselves within the limits prescribed by the act of 1789. They would not have done so in all of them, if the act of 1867, conceding it to be constitutional, required them to pass upon all the questions in the record. There is a specific allusion to both sections in Stewart *vs.* Kahn, 11 Wallace, 493; but the learned justice who was the organ of the court considered that the question before him—one of jurisdiction—was "presented by the record," and was within "the section in question of the original and of the amendatory act." No opinion was given adverse to the views here advanced.

I submit that the answer to the second proposition should be in the negative.

Upon the third proposition, I submit that the Constitution does not authorize Congress to confer such a jurisdiction on this court.

The judicial power of the United States extends to all cases in law and equity arising under the Constitution, laws, and treaties of the United States. The Constitution, the laws in pursuance thereof, and treaties, are the supreme law of the land.

I need not refer to the remaining branches of the judi-

ciary clause, or to other provisions of the Constitution, except to say that this court "has appellate jurisdiction in such cases, with such exceptions and under such regulations as the Congress shall make."

This court has decided that "a case in law or equity consists of the rights of one party as well as of the other, and may truly be said to arise under the Constitution or law of the United States whenever its correct decision depends upon the construction of either."—(Martin *vs.* Hunter, lessee, 1 Wheaton, 314; Cohen *vs.* Virginia, 6 Wheaton, 204; Osborn *vs.* Bank of the United States, 9 Wheaton, 821; The Mayor *vs.* Cooper, 6 Wallace, 247.)

The argument on the other side is that, where a court has jurisdiction of a suit, it has a right to decide every question which occurs in it. This, as applied to a court of original jurisdiction, is true; and it may be added that its judgment, whether correct or not, is, until reversed, binding upon every other court. But the doctrine does not apply to the appellate jurisdiction of this court over State tribunals, and cannot be upheld in considering the power which, in our complex system of government—Federal and State—has been vested in the Judiciary Department of the United States. It is an established rule of interpretation that the nature and object, the scope and design, of any given power must be carefully considered with all the lights of cotemporary history. If there be any serious doubts respecting its extent, the purpose for which it was conferred should have controlling influence in determining it. Although the grant may be in general terms, it must be construed with such restrictions as are imposed in some other parts of the instrument, either expressly or by necessary implication. (2 Cranch, 358; 9 Wheaton, 8; 12 Wheaton, 232.)

The State governments were in existence at the adop-

tion of the Constitution. They were then justly and universally regarded as the peculiar guardians of the rights of the people, and their legislation and policy were subject to direct and effectual control. Their courts were in full operation, clothed with adequate power to maintain social order, punish crime, and enforce all the rights of their own citizens, whether of person or of property. A Federal appellate tribunal had a nominal existence in matters of prize, but its decrees were not worth the paper upon which they were written, as no power to enforce them was lodged in Congress. Complaints were made that justice was not in all cases impartially administered against a citizen of one State at the suit of a citizen of another, or of a foreign State; treaties involving the good faith and honor of the country remained a dead letter for want of authority and means to enforce them.

The people of the United States established a government, clothed it with certain powers specifically enumerated in the Constitution, and declared what should be the supreme law of the land. They not only rendered the judicial coextensive with the legislative power, but they made this court the final arbiter of all conflicts between that law and the State constitutions and laws which became the subject of judicial arbitrament. If that power had not been lodged here, a balance wheel would have been wanting to a system designed to maintain in harmonious combination the supremacy of the National Government, the rights of the States, and the liberties of the people. Such a power, so potent for good, when confined within its allotted sphere, will, when pushed beyond it, become equally potent for evil. It will inevitably lead to conflicts of authority, and to irreparable mischief and confusion.

I had supposed that two doctrines in our American

constitutional jurisprudence were settled beyond controversy, and were worthy of all acceptation. They are: First, when questions touching the supreme law of the land arise in a State court, it is its duty to follow the decision of this tribunal as the final and paramount authority under the Constitution. Second, if no such questions arise, it is entirely independent of all Federal judicial supervision; and when they do arise, and have been decided adversely to the party claiming some right or protection under that law, such supervision must be confined solely to them. Such were the teachings of the school in which I learned my first lessons, and I have heard nothing which causes me to doubt their soundness.

The definition of the word "case," above quoted, is the foundation upon which the argument on the other side rests. Before this court can decide a question respecting the supreme law, it must assume a form upon which the judicial power is capable of acting, or, in other words, it must be presented by a party who asserts his rights in a court of justice in the mode prescribed by law. If the correct decision of that question was essential to the ascertainment and adjudication of his rights, the court held that the suit was, within the meaning of the Constitution, one in which it had appellate jurisdiction over the State court, so far as that question was concerned. It was asserting and vindicating its now conceded power over such a question, although other disputed matters were involved in the controversy. The remarks of the learned judges, quoted by the other side, must be considered with special reference to the point then under consideration.

The questions were as follows: In Martin *vs.* Hunter, whether the plaintiff's title was protected by treaty; in Cohen *vs.* Virginia, whether an act of the party was

authorized by Congress; in Osborn *vs.* The Bank of the United States, whether Congress could enable the institution to sue in the Federal courts; and, in The Mayor *vs.* Cooper, whether a party sued in a State court for an alleged trespass, and who filed a petition setting forth that the trespass complained of was committed during the rebellion, by order of the President of the United States, was entitled, under the acts of 1863 and 1866, to remove the cause to the Circuit Court of the United States. The first suit depended in this court wholly upon the construction and effect of a treaty; the second, upon an act of Congress, and the chief justice remarked that the record had been transferred "to the Supreme Court for the sole purpose of inquiring whether the judgment violates the Constitution or laws of the United States," and that it was "essentially an appeal upon a single point." In the third, all the rights which the Bank had, or could acquire, depended upon its charter, and those rights might be asserted in a court of the United States, as they arose under an act of Congress. In the last, the party was entitled to the order, pursuant to the law upon which he relied, as he set up "a claim to exemption," but the court gave no opinion as to its validity. None of them, however, touch the precise point which is presented by the third proposition.

Counsel on the other side insist that our view limits this court to the disposal of "questions," whereas its jurisdictions extends to "cases." The word "case" is sometimes used as a synonym for suit, but it may have a different import. A sues B upon a promissory note; B sets up a defense good under a State law. A claims that the law is in conflict with the Constitution of the United States, and therefore void. Now, it would be a gross abuse of language to say that the "suit" or cause of action arose under the Constitution; but the validity of the law, if sustained by

the State court, can be reëxamined here, as the facts set up, or "case" made by the plea, presents a question within the acknowledged jurisdiction of the court. The decision of that isolated question covers the whole "case" in this court, although the proceedings below may have presented other controverted points. So in Cohens *vs.* Virginia, the plaintiff in error was prosecuted in that State for selling lottery tickets, which he sought to justify under an act of Congress; and when this court passed upon its construction and validity, the whole "case" was adjudged. A case, therefore, arises under the Constitution, an act of Congress, or a treaty, whenever a right derived from, or protected by, either is in controversy. The court, *supra*, has used the term in this qualified sense. In determining that right, or the questions relating to and inseparably connected with it, the court disposes of the whole "case," when the suit is brought here by writ of error from a State court.

In suits where the inferior courts of the United States, by reason of the subject matter, have, by law, exclusive original cognizance, or where, by reason of the character of the parties, their jurisdiction is concurrent with that of the State courts, they are vested, and, in order to determine the rights of parties, must necessarily be vested, with full authority to pass upon every question. In the first class the right, out of which the subject-matter in controversy grows, is given by Congress under powers which, in terms, are vested solely in, or, from their nature, must be exercised exclusively by, it; and which are consequently prohibited to the States. The party must resort to the national courts for the enforcement of his rights or be without redress. In the second class, those courts have jurisdiction when Congress confers it, as the judicial power, by the express letter of the Constitution, extends to such controversies. In both cases the appellate juris-

diction, under such regulations as Congress may provide, will correct any error of law and sometimes of fact, committed to the prejudice of either party. The same remark will apply to cases removed from a State, to a Federal, court, pursuant to the act of 1789 or any subsequent legislation. But the rule is different when neither party seeks a removal, or when the State courts have proceeded to judgment in suits within their jurisdiction—a jurisdiction vested in them before the adoption of the Constitution, and of which no syllable in that instrument deprives them. They have been organized by the people of the several States to interpret their laws, and to administer justice according to law. Their relations to this court are not those of an inferior court of the United States. Congress cannot impose duties upon the State judges, nor enlarge their jurisdiction by investing them with any part of the judicial power of the United States, nor interfere with their jurisdiction over the rights of their own citizens, which grow out of, or are exclusively controlled by, the local laws. No such power has been given, expressly or by implication, to any department of the Government of the United States. This court can determine a Federal question presented in the manner prescribed by both of the acts mentioned in the "propositions" without regard to the court in which it originates. If, on that question, it concurs in opinion with the susupreme court of a State, it would be a strange solecism if the "final judgment or decree" of the latter could be reversed and set aside upon distinct and independent matters, over which, in the absence of that question, this court would have no jurisdiction whatever. Congress cannot, without a gross disregard of the limitations and of the whole spirit of the Constitution, confer such juris diction. However wisely and cautiously it might be

exercised, its tendency would be to impair the rightful control of the States and of their tribunals over their own domestic concerns. If such legislation be sanctioned, and the restraints upon the power of Congress cast aside, "our Government," in the language of Mr. Justice Field, "will inevitably drift from the system established by our fathers into a vast centralized and consolidated government."

"Two ends of paramount importance," says Story, (Commentaries on the Constitution, sec. 1,576,) "and fundamental to a free government, are proposed to be attained by the establishment of a national judiciary. The first is a due exercise of the powers of the Government, and the second is a uniformity in the interpretation and operation of those powers and of the laws enacted in pursuance of them." Mr. Chief Justice Jay, in Crisholm *vs.* The State of Georgia, 3 Dallas, 419, in analyzing the judicial power of the United States, conferred in order "to establish justice," refers to the instances to which it applies, and thus vindicates the wisdom and necessity of granting it:

"First. Because the meaning, construction, and operation of a compact ought always to be ascertained by all the parties, not by authority derived from only one of hem.

"Second. Because as the laws" (of the United States) "constitutionally made are obligatory on each State, the measures of obligation and obedience ought not to be decided and fixed by the party from whom they are due, but by a tribunal deriving authority from both the parties.

"Third. Because as treaties are made by, and obligatory on, the whole nation, their operation ought not to be affected or regulated by the local laws or courts of a part of the nation."

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"Third. Because as treaties are made by, and obligatory on, the whole nation, their operation ought not to be affected or regulated by the local laws or courts of a part of the nation."

The remaining heads do not relate to the question under discussion.

These opinions are conclusive upon this point. The power in question was given to secure a uniformity of construction of the supreme law of the land, and to vindicate its paramount authority. It should, therefore, by every sound rule of construction, be limited to attain these vitally important objects, and I respectfully submit that, in exercising it, thus far can the court rightfully and constitutionally go, and no farther.

W. T. OTTO,
Attorney for Defendants in Error.

20398

Supreme Court of the United States.

DECEMBER TERM, 1872.

THOMAS MURDOCK *et al.*, *Plaintiffs in Error*, *vs.* THE MAYOR AND ALDERMEN OF THE CITY OF MEMPHIS. } No. 106.

It is ordered that this case be reargued on the first day of April next, on the following propositions:

1. Does the second section of the act of February 5, 1867, repeal all or any part of the 25th section of the act of 1789, commonly called the judiciary act.

2. Is it the true intent and meaning of the act of 1867, above referred to, that when this court has jurisdiction of a case by reason of any of the questions therein mentioned, it shall proceed to decide all the questions presented by the record which are necessary to a final judgment or decree.

3. If this question be answered affirmatively, does the Constitution of the United States authorize Congress to confer such a jurisdiction on this court?

MARCH 10, 1873.

True copy.

D. W. MIDDLETON,
C. S. C., U. S.

Upon the questions proposed for reargument, we maintain the following propositions:

1st. That the 25th section of the act of 1867, does not repeal the whole, but only, and by implication, a part of the 25th section of the act of 1789. It leaves unrepealed the final clause of the 25th section, which limits the grounds of reversal to such as respect Federal questions involved.

2d. If the said final clause of the 25th section be repealed, then the act of 1867 does not prohibit this court to decide all questions presented by the record, which are necessary to a final judgment or decree.

3d. But the Constitution does not authorize Congress to confer on this court jurisdiction to decide all the questions presented in this record, unless the decision of the same be necessary to give effect to some Federal right, which has been denied by a State court, and upon the denial of which only, the jurisdiction of this court attached.

I.

The scheme of the act of 1789 is this:

1. The Supreme Court may review all cases in State courts in which a right or exemption has been claimed under the Constitution or laws of the United States, and has been denied.

2. The Supreme Court can reverse only when such a claim has been *wrongfully* denied.

3. In case of such reversal the Supreme Court can consider every question presented by the record necessary to final judgment or decree on the merits.

While the Constitution in general terms gives jurisdiction of all cases arising under the Constitution, laws and treaties of the United States, the act of Congress of 1789 does not define the jurisdiction in the words of the Constitution or in any equivalent terms.

It undertakes to accomplish the object by an enumera

tion of classes of cases which may come up for decision, and by confining the decisions of the court thereon within the proper sphere of Federal jurisdiction. And the provisions of the act always work out this result, viz: that the judgment of the State court must be affirmed, unless this court shall find that a right was properly claimed under the Constitution and laws of the United States, and being so properly claimed was wrongfully denied.

All the cases included in the 25th section may be resolved into several classes of rights denied There are three classes of enumerated cases; the first and third include rights granted by the Constitution and laws of the United States; the second includes rights to immunity from the operation of State laws repugnant to the Constitution and laws of the United States. When the claim to a right of either class is denied, the jurisdiction of this court attaches under the act 1789, but if the denial of such claim be proper, if there be no error therein, this court cannot reverse and so must affirm the decision of the State court, whatever may be its opinion on other questions presented by the record. And this is as it should be; for what reason has the Federal judiciary to interfere with the judiciary of the States, so long as that judiciary does not deny to any party any right guaranteed or given under the Constitution and laws of the United States?

But when this court determines that there is error in the judgment of the State court denying the claim set up, then and not till then, it may reverse the judgment of the State court, and open the cause to such judgment as this court itself shall pronounce to give effect to the whole. And this is as it should be. A right guaranteed by the Federal authority having been denied and disregarded by the State court, if the Federal judiciary should not take the cause its own hands to enforce that right, the laws of the United States would be a dead letter. And while in proceeding to enforce such rights this court must

Upon the questions proposed for reargument, we maintain the following propositions:

1st. That the 25th section of the act of 1867, does not repeal the whole, but only, and by implication, a part of the 25th section of the act of 1789. It leaves unrepealed the final clause of the 25th section, which limits the grounds of reversal to such as respect Federal questions involved.

2d. If the said final clause of the 25th section be repealed, then the act of 1867 does not prohibit this court to decide all questions presented by the record, which are necessary to a final judgment or decree.

3d. But the Constitution does not authorize Congress to confer on this court jurisdiction to decide all the questions presented in this record, unless the decision of the same be necessary to give effect to some Federal right, which has been denied by a State court, and upon the denial of which only, the jurisdiction of this court attached.

I.

The scheme of the act of 1789 is this:

1. The Supreme Court may review all cases in State courts in which a right or exemption has been claimed under the Constitution or laws of the United States, and has been denied.

2. The Supreme Court can reverse only when such a claim has been *wrongfully* denied.

3. In case of such reversal the Supreme Court can consider every question presented by the record necessary to final judgment or decree on the merits.

While the Constitution in general terms gives jurisdiction of all cases arising under the Constitution, laws and treaties of the United States, the act of Congress of 1789 does not define the jurisdiction in the words of the Constitution or in any equivalent terms.

It undertakes to accomplish the object by an enumera

tion of classes of cases which may come up for decision, and by confining the decisions of the court thereon within the proper sphere of Federal jurisdiction. And the provisions of the act always work out this result, viz: that the judgment of the State court must be affirmed, unless this court shall find that a right was properly claimed under the Constitution and laws of the United States, and being so properly claimed was wrongfully denied.

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necessarily decide questions of State law, it avoids any unnecessary interference with the State jurisdiction, by taking as far as possible, the State law to be as it is declared by the State courts.

II.

In cases coming up under the acts of 1867, if error be found in the decision denying a federal right claimed, the course of the court would be the same as under the act of 1789. It is only in cases where the decision of the State court on the federal question shall be found to be correct, that a question arises as to the course to be pursued. Under the act of 1789 the course would be to affirm; what shall it be under the act of 1867?

Suppose that in a suit in a State court betweentwo citizens of the same, upon a contract for the payment of money, the defendant should plead a State statute of limitations, and the plaintiff should question the validity of the statute on the ground of its impairing the obligation of the contract, the court overrules the objection and declares the statute valid, and gives judgment for the defendant, that by writ of error the cause is brought here, and that this court concurs with the State court that the statute is valid. But there are a number of exceptions in the record, taken by the defendants to rulings of the court, upon other points involving no federal question, is this court to examine them and reverse for error therein? Or, if in a suit in equity for an account between two citizens of the same State, the defendant should set up that he was entitled under the Constitution of the United States to trial by jury, and the court should overrule the objection and proceed to a decree for the complainants, and on the case being brought here by writ of error, this court should concur with the State court in the decision of the federal question, must this court, or can this court, proceed to examine every question raised in the record?

Such, on the first impression, might seem to be the duty of the court if the construction of the act of 1867 be not controlled by reference to the Constitution, and if the decision of the court be freed from the restraint imposed by the second clause of the 25th section of the act of 1789. In the jurisdiction to re-examine, and to affirm or reverse cases brought up under the act of 1867, and in case of reversal proceed to a final decision and award execution, it is difficult to see in the act itself anything to prevent this court from deciding every question at issue between the parties which it is necessary to decide to dispose of the case upon the merits. But if this court pursue this course, it determines a controversy between two citizens of the same State in a matter depending solely upon questions of State law, and in so doing, we submit, manifestly encroaches upon the exclusive province of the judiciary of the States.

We see, then, how important is the office of the last clause of the 25th section in protecting the State judiciary from any unnecessary interference of the federal judiciary, and allowing the latter to interpose only when it has a special work to perform in the enforcement of a federal right. And this clause it seems to us derives its authority, not from Congress alone, but as some statutes are merely declaratory of the common law, this clause we submit is declaratory of the Constitution. But this we discuss hereafter.

III.

Let us now consider whether the last clause of the 25th section of the act of 1789 is repealed by the act of 1867.

The 25th section contains two distinct members.

The *first* gives this court jurisdiction of certain cases.

The *second* forbids this court to reverse the decisions of the State courts, except in certain cases.

The *first* clause concerns only the grant of jurisdiction; the second concerns only the exercise of the jurisdiction.

Whether the last clause of the 25th section stand or fall, the class of cases coming within the jurisdiction of this court under the second section of the act of February 5, 1867, remains the same. No motion to dismiss for want of jurisdiction is ever founded on that clause.

The court must take jurisdiction and re-examine the decision of the State court, to a certain point, before the second clause of the section comes into operation.

Such being the office of the clause, is it repealed simply by not being repeated in the act of 1867, for there are no express words of repeal in that act. The repeal then, if effected, must be by implication only.

The doctrine of the text books is strong against repeal by implication. Dwarris, on Statutes and Constitution, says: "The leaning of the courts is so strong against repealing the positive provisions of a former statute by construction, as almost to establish the doctrine of no repeal by implication. But this goes beyond the limits of Foster's case, that such repeal is not to be favored, and in a recent case Lord Denman said: 'While we hold that a positive enactment is not to be restrained by inference, we must also act on the maxim *leges posteriores priores contrarias abrogant*, whenever it comes in operation.'"

See further the American notes, No. 4, to Potter's Dwarris, Ed. 1871, p. 154.

The decisions of this court supports the positions above taken. Mr. Justice Story, delivering the opinion of this court in Wood *vs.* The United States, 16 Peters, 342, 362, said:

"That it [a previous law] has not been expressly or by direct terms repealed, is admitted; and the question resolves itself into the more narrow inquiry, whether it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it, for they may be merely affirmative or

cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy."

Many other examples of the same ruling may easily be found.

That there is no repugnancy between the second clause of the 25th section and the second section of the act of 1867, is manifest, when we consider that the latter section is a transcript from the former section in all that relates to this subject—the only material difference being that whereas in case of reversal, the act of 1789 required that the cause should be once remanded before this court could proceed to a final decision, the act of 1867 authorizes the court on the first hearing to proceed to a final decision. This change, though in the highest degree important, does not affect the question as to the jurisdiction to reverse. It concerns a subsequent stage of the case. And as the second clause of the 25th section has stood with the first clause of the same section, so it may stand equally with the second section of the act of 1867. It covers entirely different ground. The court may take jurisdiction of cases under the act of 1867, as it has heretofore done under the act of 1789, and in case of reversal may pursue the more speedy course prescribed by the latter act; but in determining for what causes it may reverse, it finds nothing whatever in the act of 1867, nor elsewhere than in the act of 1789.

But again says Dwarris:

"In every act professing to repeal or interfere with the provisions of a former law, it is a question of construction whether it operates as a total or partial or temporary repeal." Dwarris' Statutes, Potter's Ed., 1871, p. 158.

And Mr. Justice Story, in the case above cited, argues not only from a comparison of the two statutes supposed to be in conflict, but from the object and character of the

system of laws of which those two formed part, against the intention of Congress to repeal the earlier statute. A similar argument may be urged with great force against the repeal suggested here.

The clause in question was adopted in the organic act; it is contemporary with the existence of this court; when the act of 1789 was drawn, Congress had under consideration the whole subject of the judicial power of the United States, and was providing for the exercise of it by the appropriate agencies. It had in view all the bearings of this power upon the judicial power of the States; it undertook to define the limits of each, and the clause in question was deliberately adopted as a line of demarcation between the two. If Congress intends now to pass this limit, to extend the judicial power of the United States over a class of cases which has never yet been subject to the federal authority, this court surely has a right to look for something more certain than the mere omission of a part of an act in a later act, which does not purport to cover the whole subject of the former, but leaves the court to discover by inference and construction, what part of the former act is covered and so suspended and repealed. If ever clear and unambiguous language is required in legislation it would seem to be in defining the jurisdiction of the courts, and it seems monstrous that the tribunals appointed to construe the law, should first have to discover by construction whether they have the power to construe them.

In the American editor's note 5, to the passage of Dwarris cited above, he cites authorities to show that "the more natural if not necessary inference is, that the legislature intended the new law to be auxiliary to and in aid of the purpose of the old law." We submit that this intention on the part of Congress in the present case is quite apparent.

IV.

But if it was the intention of Congress to repeal the entire 25th section of the act of 1789, and thereby to enlarge the jurisdiction of this Court, the remaining, and, indeed, fundamental question is, whether the Constitution of the United States authorizes Congress to confer such additional jurisdiction.

The power of Congress in respect of the jurisdiction of this court, conferred by the Constitution, is confined to the appellate jurisdiction only. After enumerating the cases of original jurisdiction, the Constitution, art. 3, sec. 2, provides: "In all the cases beforementioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

The power here given is to regulate the exercise of jurisdiction, not to confer it. For the limit of that jurisdiction we are referred to the previous definition of the federal jurisdiction in the Constitution itself.

It is no longer, if it ever was, an open question whether cases in which a federal question arises merely collaterally are within the grant of federal judicial power: that was affirmed in the act of 1789—which is a contemporaneous construction of the Constitution, (Cohens *vs.* Virginia, 6 Wheaton,) and has always been followed by this court. The Constitution, so construed, does not mean that such a case is a suit founded upon a federal law, but that when in a suit founded upon a private contract between individuals, the construction of a federal law is drawn in question, then a case arises, and the federal jurisdiction attaches.

But in construing the Constitution in the light of the act of 1789, we must take the whole act into consideration, and especially the whole of the 25th section. And by that we find that while in terms the section, in its first clause, purports to give jurisdiction of any case in which a claim of federal right has been denied, yet the whole section

taken together, gives jurisdiction to decide the whole case only when a claim of federal right has been *wrongfully* denied. The act of 1789 is therefore no authority for the position, that when a federal question arises within the terms of the first clause of the act of 1789, the court may proceed to decide the whole case; for this court has not exercised such jurisdiction upon such a case merely. It does not exercise jurisdiction of the whole case, until it shall have found that a claim of federal right has been not merely denied, but also wrongfully denied.

It cannot, surely, be said that the jurisdiction now claimed for the court, to determine every question on the record, has heretofore existed, when, in fact, the Court could only determine such question after reversing the decision of the State, and could only reverse such decision after finding that a federal right had been denied.

In considering the question whether this Court has acquired jurisdiction to determine cases decided in the State court where no federal right was denied, we suggest that the circumstance just mentioned demands some consideration. If the determination of such cases be within the judicial power of the United States, it follows that from the organization of the Government to the present time, Congress has omitted to provide for the exercise of the judicial power of the United States in a vast class of cases arising under the Constitution, laws and treaties of the United States. Such an omission, said this court, in Martin *vs.* Hunter's lessee, is not to be imputed to Congress. Said the Court in that case:

"Let this (the third) article be carefully weighed and considered. The language of the article throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative that Congress could not, without a violation of its duty, have refused to carry it into operation. The judicial power of the United States

shall be vested (not may be vested) in one Supreme Court, and in such inferior courts as Congress may from time to time establish. Could Congress have lawfully refused to create a supreme court, or to vest in it the constitutional jurisdiction? (p. 326.) The judicial power must, therefore, be vested in some court by Congress; and to suppose it was not an obligation binding on them, but might at their pleasure be omitted or declined, is to suppose that under the sanction of the Constitution, they might defeat the Constitution itself. A construction which would lead to such a result cannot be sound. (p. 327.)

"It being then established that the language of this clause is imperative, the next question is as to the cases to which it shall apply. The answer is found in the Constitution itself. The judicial power shall extend to all the cases enumerated in the Constitution. As the mode is not limited, it may extend to all such cases in any form in which the judicial power may be exercised. In what cases, if any, is this judicial power exclusive or exclusive at the election of Congress? It will be observed that there are two classes of cases enumerated in the Constitution between which a distinction seems to be drawn. The first class includes cases arising under the Constitution, laws and treaties of the United States; cases affecting ambassadors, other public ministers and consuls, and cases of admiralty and maritime jurisdiction. In this class the expression is, and that the judicial power shall extend to all cases; but in the subsequent part of the clause which embraces all the other causes of national cognizance, and forms the second class, the word *all* is dropped seemingly *ex industria*. * * In respect to the first clause it may well have been the intention of the framers of the Constitution imperatively to extend the judicial power either in an original or appellate form to *all cases;* and in the latter class to leave it to Congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate.

"The vital importance of all the cases enumerated in the first class to the national sovereignty, might warrant such a distinction. (pp. 333, 334.) All these cases then enter into the national policy, affect national rights, and may compromit the national sovereignty. The original or appellate jurisdiction ought not, therefore, to be restrained, but should be commensurate with the mischief intended to be remedied, and of course should extend to all cases whatsoever. (p. 335.)

"In the first class of cases the jurisdiction is not limited, except by the subject-matter; in the second, it is made materially to depend upon the value in controversy. (p 336.) But even admitting that the language of the Constitution is not mandatory, and that Congress may omit to vest the judicial power in courts of the United States, it cannot be denied that when it is vested, it may be exercised to the utmost constitutional extent." (p. 337.)

This opinion is an elaborate commentary on the act of 1789, and we regard the passages from which the above extracts are taken as authority for these propositions, viz: That the whole judicial power of the United States in respect of cases arising under the Constitution, laws and treaties of the United States, had been in an appellate form vested in the Supreme Court of the United States; that every case so arising, had been provided for in that act, and that the jurisdiction of the court in respect of those cases was limited only by the Constitution itself. This being so, we do not see how Congress can, by any supposed power of regulation, enlarge the jurisdiction of this court either to consider any new class of cases, arising under the Constitution, laws and treaties of the United States, or confer on this court jurisdiction to pronounce judgments or decrees which heretofore it could not pronounce. If, however, this be so, it appears to us that the second clause of the 25th section of the act of 1789, has been either an unconstitu-

tional limit imposed by Congress on the jurisdiction of this court, or an unconstitutional imposition of a rule of decision imposed by Congress on the judgments of the court. We can see in Congress no authority to fetter the jurisdiction or mould the decisions of the court by that clause, and we therefore attribute its efficacy, not to the legislative power of Congress, but to the limitation of the judicial power in the Constitution.

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For Appellees.